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No. 95-821

In The Supreme Court of the United States

October Term, 1995

Mary Martin, Guardian of Michael Martin,
Petitioner,

v.

Patricia Major and Leeta Martin,
Respondents.

Petition for Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Michael Martin has been artificially maintained on life-support since he sustained catastrophic injuries more than eight years ago. The Michigan Supreme Court held that Mary Martin, who is Michael's wife and duly-appointed legal guardian, may not authorize withdrawal of Michael's life-sustaining medical treatment, despite Michael's repeated and adamant pre-accident instructions that Mary not permit him to be artificially maintained in a helpless and dependent condition. Two questions are presented:

(1) Whether a state that refuses to authorize withdrawal of life-sustaining treatment except where there is proof, by clear and convincing evidence, that a patient anticipated the "specific circumstances" of his incapacity, unduly interferes with an incompetent patient's liberty interest under the Due Process Clause of the Fourteenth Amendment in exercising his right to reject unwanted medical treatment.

(2) Whether a state must, consistent with the Fourteenth Amendment's Due Process Clause, defer to the decision of a surrogate if competent and probative evidence establishes that the patient expressed a desire that the decision to withdraw life-sustaining treatment be made for the patient by the surrogate.

LIST OF PARTIES

The caption of the case contains the names of all the parties, except for Irving Stahl, Esq., who has served as the guardian *ad litem* for Michael Martin in these proceedings.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Mary Martin, who is the wife and duly-appointed legal guardian of Michael Martin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Supreme Court in this case.

OPINIONS BELOW

The opinion of the Michigan Supreme Court, App. *infra*, 1a-43a, is reported at 450 Mich. 204; 538 N.W.2d 399 (1995). The two opinions of the Michigan Court of Appeals, App. *infra*, 44a-58a and 97a-114a, are reported at 205 Mich. App. 96; 517 N.W.2d 749 (1994); and 200 Mich. App. 703; 504 N.W.2d 917 (1993) respectively. The two bench opinions of the Allegan County Probate Court are not reported. They are reprinted in

the Appendix, *infra*, 63a-96a and 117a-128a, respectively. Each bench opinion was followed by a brief order of the Probate Court. Those orders may be found in the Appendix, *infra*, 59a-62a and 115a-116a, respectively.

JURISDICTION

On remand from a decision of the Michigan Court of Appeals reversing the Allegan County Probate Court's initial holding, the Allegan County Probate Court entered an order on October 8, 1993, confirming petitioner's authority to terminate her husband's artificial means of life-support. On May 2, 1994, the Michigan Court of Appeals affirmed the Probate Court's decision. On August 22, 1995, the Michigan Supreme Court reversed the opinion of the Court of Appeals. Throughout these proceedings (as noted further below), petitioner asserted, *inter alia*, that Michael Martin has a liberty interest under the Due Process Clause of the United States Constitution to be free from unwanted medical treatment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, provides in pertinent part:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

U.S. Const. amend. XIV, § 1.

STATEMENT

1. In January 1987, Michael Martin, his wife, Mary, and their three children were in the family's automobile when it was struck by a train. One of the children, Melanie, was killed in the accident. Michael suffered catastrophic injuries that left him permanently incapable of performing any basic human function. He cannot talk, walk, eat, or roll over, and he has no bladder or bowel control. He requires a feeding tube for nutrition and a colostomy for defecation. He is almost entirely paralyzed

and, although conscious, is unable to communicate meaningfully. When it became apparent, after five years of intensive rehabilitative therapy, that Michael's condition would never improve, Mary sought permission to carry out Michael's previously and repeatedly stated wishes that she ensure that he never be forcibly kept alive in a dependent and hopeless state.

In January 1992, Mary brought Michael's case to the Bioethics Committee of Butterworth Hospital in Grand Rapids, Michigan. The Hospital Bioethics Committee concluded that "the persistence of [Michael's] condition and the level of his functioning were equivalent to a persistent vegetative state for purposes of considering the removal of nutrition support," that "there was virtually no hope of improvement in his condition," that "from an ethical standpoint, it was a reasonable request to discontinue [Michael's] nutritive support," and that such a request "was in accord with Mr. Martin's wishes as expressed to [his wife] and one of his co-workers." R. 633b.[1]

2. In March 1992, Mary petitioned the Allegan County Probate Court for instructions regarding her authority, as Michael's wife and legal guardian, to withdraw Michael's medical treatment. She argued, *inter alia*, that under the United States Constitution Michael "has a protected liberty interest in refusing unwanted medical treatment," [2] and that Michael had exercised this interest by making Mary promise that she would never let him persist in a dependent and hopeless state. Michael's mother, Leeta Martin, and sister, Patricia Major, opposed Mary's peti-

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[1] The citation is to the Record before the Michigan Supreme Court.

[2] Brief Of Guardian For Confirmation Of Authority To Discontinue Medical Treatment, Withdraw Artificial Means Of Life Support, And Other Relief at 9 (Probate Court for the County of Allegan, Apr. 8, 1992). *See also id.* at 23.

tion and asked the Probate Court to remove Mary as Michael's guardian.

The Probate Court appointed a guardian *ad litem* for Michael, and for his children, Melinda and Matthew.[3] After an extensive independent investigation, the guardian *ad litem* supported Mary's request for authority to terminate Michael's medical treatment. R. 580b-595b. In October 1992, after a lengthy hearing and a bedside visit with Michael, the Probate Court found that Michael was not competent to make treatment decisions and that "Michael's statements made prior to the accident were clear and convincing [sic] of his intent not to be kept a dependent person." App. 122a. The Probate Court nevertheless declined to authorize withdrawal of life-sustaining treatment, holding that, in Michigan, a legally incompetent person must have expressed his medical treatment preferences in writing. *Id.* at 122a-123a.

Mary Martin appealed, arguing in part that the requirement of written proof of Michael's wish for non-treatment was unconstitutional under both the Michigan and the United States Constitutions.[4] The Court of Appeals reversed, holding that written proof was unnecessary, and remanded for further findings regarding Michael's medical condition and capacity to make treatment decisions, Michael's previously expressed wishes concerning withdrawal of medical treatment, and the request of Michael's mother and sister that Mary be removed as guardian. App. 101a-111a.

3. During the remanded proceedings in September 1993, the Probate Court considered extensive testimony on each of the issues identified by the Court of Appeals.

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[3] Melinda is now 20 years old and Matthew is 14. At the first Probate Court hearing, Melinda testified that she has long supported the decision to withdraw life-support. R. 117b. Matthew also supports the decision, but he did not testify. R. 2b-3b.

[4] Appellant's Brief at 24-25 (Michigan Court of Appeals, Mar. 31, 1993).

The Probate Court summarized its "finding of what [Michael's] condition is" in these words:

> He certainly is a total care patient. He cannot walk, he cannot talk, he cannot swallow, he cannot take food in other than what he receives through the tube. He is paralyzed on the left side. He has limited movement on his right,—his right leg, his right hand, —or a couple fingers at best, perhaps somewhat of a pinching move between his thumb and his forefinger, which isn't reliable to a great degree. He is unable to—he doesn't have the mental capacity to retain information. I believe that it was described that he lives for the moment. He is not able to retain information from hours before—or days, or weeks. He is a total care patient with no hope of ever getting better.

Id. at 94a. The court found the evidence "clear and convincing" that Michael does not have the capacity to understand or to make treatment choices,[5] and "[e]qually clear and convincing" that he "will not regain the capability of making those decisions for himself." *Id.* at 69a.

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[5] Michael's primary means of communication, head nodding or shaking for "yes" and "no," is of limited utility because his response to simple commands and his ability to recognize familiar faces, names, and places is "consistently inconsistent" due to his brain injuries. R. 218b. For example, upon examination of Michael by Ronald Cranford, M.D., a nationally-recognized neurologist, Michael nodded that he could eat, walk and talk, although he cannot do any of them; he indicated that he is not paralyzed, which he is; and that he does not wear a diaper, which he does; by nodding, Michael also exhibited that he does not know his injuries were caused in a car accident, or that he is in a nursing home; he denied he has a feeding tube; and he indicated he receives food and water by mouth. R. 434b-445b. Later in the examination, Michael again denied he is paralyzed, denied he is brain-damaged, and indicated that he can go to the bathroom himself. *Id.* Each of these responses is, tragically, incorrect. The Probate Court concluded that Michael "does not have the capacity to understand his condition of where he is, how he got there, what he can do, and what he can't do." *Id.* at 519b.

At the hearing, petitioner presented evidence that Michael had engaged in many discussions throughout his adult life about his desire not to be subjected to life-prolonging medical treatment. In particular, Mary testified about discussions that she had with Michael " 'on many different occasions' " over the years preceding the accident. *Id.* at 24a-25a. In these discussions, Michael insisted that Mary not allow him to persist in a helpless and hopeless condition, incapable of performing basic human functions such as walking, talking, dressing, bathing, or eating, and dependent upon others and upon machines for his basic needs. According to Mary's unchallenged testimony, "Mike's position was always the same: he did not want to be kept alive on machines . . . ." *Id.* at 25a. Referring to people who "could no longer do anything for themselves, such as persons who lived in a nursing home and could no longer feed or dress themselves and needed to wear diapers or have other measures taken to continue existing," Michael repeatedly said to Mary, " '[p]lease don't ever let me exist that way because those people don't even have their dignity.' " *Id.* Michael also told Mary, " '[i]f I ever get sick, don't put me on any machines to keep me going if there is no hope of getting better.' " *Id.* Indeed, Michael made Mary promise that she would not permit him to endure such an existence, and he stated that if she failed to honor her promise, he would " 'haunt [her] every day of [her] life.' " *Id.* at 26a.[6]

Regarding this evidence, the Probate Court stated "if I had to pick a credible witness in this particular proceedin[g] from day one until today I would have to pick Mary Martin [as] a most credible, if not the most credible wit-

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[6] After Michael conveyed his treatment instructions to Mary, he would say, " 'Do you understand?' " and Mary "always said, 'Yes.' " Mary also testified that Michael stated to her, " 'Mary, promise me you wouldn't let me live like that . . . because if you do, believe me I'll haunt you every day of your life.' " In reply, Mary made a "promise to him and made him promise [her] the same." App. 26a.

ness the Court has heard throughout these proceedings." *Id.* at 76a. The court expressly found that the conversations that Mary described having with her husband about his treatment wishes "took place and [] were of the nature as described by Mary Martin." *Id.* at 77a. The court noted in particular Mary's testimony about Michael's "statements to Mary that if she ever let him, or allowed him to continue in a totally kept condition as he is in now, in this Court's opinion,—that he would haunt her for the rest of her life." *Id.* at 90a. Based on Michael's conversations with Mary, the court concluded:

> It was Michael's determination that he didn't want to live in circumstances such as where he would be a total care person . . . . He didn't want somebody changing his diapers,—washing him, feeding him, paralyzed, unable to communicate.

Id. at 77a-78a. The court then went on "to emphasize":

> so that there is no misunderstanding here, that there is clear and convincing evidence in this Court's opinion that Michael previously expressed desires regarding life support under the conditions in which the Court finds the patient[] to be, are that he does not want these particular life supports. He does not want to be in the condition in which he is and that the condition in which he is, is in fact supported by the nutrition and hydration tube.

Id. at 79a. As for the intervention of Michael's mother and sister, the court found that "[t]here is a big difference between Mary and, unfortunately, his sister and his mother," and that the sister and mother were seeking to further "their own interest[s]," but that Mary "wants to respect Michael's wishes." *Id.* at 83a.[7]

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[7] This finding echoes the judge's unusually candid admission of his own efforts to put the law ahead of his personal feelings; the Probate Judge stated that while "I happen to believe in the philosophy, and in the work of right to life. . . . I cannot put my personal opinion above the law." App. 66a. In contrast, although Michael's

4. The Court of Appeals affirmed the Probate Court's decision, stating that Michael's prior statements were clear and convincing evidence of his desire to refuse treatment in "exactly the condition in which Michael now finds himself":

> Prevalent throughout Michael's statements is the preference not to be maintained in a condition where he was incapable of performing basic functions such as walking, talking, dressing, bathing, or eating, and instead was dependent upon others or machines for his basic needs. *This is exactly the condition in which Michael now finds himself.* . . .
>
> . . . .
>
> Moreover, the fact that Michael's preferences were expressed repeatedly, adamantly, and in different contexts, together with the evidence showing that he had similar discussions with others, indicate that *Michael was firm and settled* in his desire to have life-sustaining medical treatment withheld or withdrawn *in the circumstances described.*

Id. at 50a-51a (emphases added).

5. The Michigan Supreme Court granted the application of Michael's mother and sister for a stay and leave to appeal and, on August 22, 1995, reversed the decision of the Court of Appeals. At the outset of its Opinion, the Michigan Supreme Court "decline[d] the invitation to reach the propriety of the constitutional and statutory issues in this case." *Id.* at 11a.[8] Applying state common

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mother, Leeta Martin, admitted that her son lived an independent, autonomous life before the accident and that his present existence is not how he would want to live, she was unable to put aside her own beliefs and asserted that Michael's prior desires should be ignored because "when the good Lord wants him, the good Lord will take him." R. 391b; *see* App. 34a n.17.

[8] Michael's mother and sister raised a number of federal constitutional and statutory claims in their appeal, including that the Court of Appeals' judgment should be reversed in order to protect Michael's Fourteenth Amendment "right to life"; Mary Martin,

law, the court said that it would honor a guardian's request for permission to terminate life-sustaining treatment "[o]nly" where the evidence is "clear and convincing" that the patient has made "a serious, well thought out, consistent decision to refuse treatment under these exact circumstances, or circumstances highly similar to the current situation." *Id.* at 23a. After summarizing some of the evidence and quoting at length from Mary Martin's unchallenged affidavit and testimony, the court cryptically concluded:

> We do not believe that the testimony and affidavit of Mary Martin . . . constitute clear and convincing evidence of Mr. Martin's preinjury statement of his desire to refuse life-sustaining medical treatment *under these specific circumstances.*

Id. at 27a (emphasis added). The court, however, never explained how the "specific circumstances" of Michael's condition differed from those he had discussed in advance with Mary, let alone why any such differences were significant. The court also left unanswered the fundamental question of why it was free to disregard Michael's clear wish to have Mary take charge of his treatment decisions in the event of his incapacity.

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on Michael's behalf, opposed this argument by relying on this Court's decision in *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), and in particular on its holding that "'the Due Process Clause protects an interest in refusing life-sustaining medical treatment.'" Brief on Appeal—Appellee at 50-51 & n.88 (Supreme Court of Michigan, Feb. 9, 1995) (quoting *Cruzan*, 497 U.S. at 281). While Mary Martin's brief did not specifically cite footnote 12 of the *Cruzan* opinion (*see* discussion *infra* pages 12, 16), its broad reliance on that case and its repeated assertion and defense of Mary as the proper guardian and the person Michael entrusted to ensure that he not be forced to endure life-sustaining medical treatment once his prognosis became hopeless, placed the issue noted in footnote 12 squarely before the Michigan Supreme Court.

In dissent, Justice Levin noted that the "evidence adduced at trial demonstrated Michael's deeply felt, consistent, and long-term desire not to be maintained artificially in a helpless condition." *Id.* at 32a. He then observed that the majority's failure to enforce an expressed wish to forgo life-sustaining treatment in hopeless situations "unless the applicable medical conditions are accurately specified" effectively "precludes the rights of patients to forgo life-sustaining treatment" and "negates the patient's right to self-determination." *Id.* at 35a.

REASONS FOR GRANTING THE PETITION

Since this Court's decision in *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), more than five years ago, numerous state courts have confronted the difficult issues posed by attempts of severely and permanently injured patients to exercise, usually through a surrogate, their right to withdraw medical treatment. The decision of the Michigan Supreme Court constitutes an extreme response to these issues, which interferes significantly with the patient's unquestioned liberty interest. The time has come for this Court to elaborate further on the proper constitutional analysis outlined in *Cruzan*. The facts of this case make it a perfect vehicle to provide needed guidance to the lower courts concerning the proper approach to deciding what is required to terminate life-prolonging medical care on behalf of an incompetent patient.

Throughout his adult life, Michael Martin repeated his adamant opposition to being sustained on life-support machines in the event catastrophic illness or injury rendered him helpless and hopeless. Yet the Michigan Supreme Court has concluded that Michael should be trapped in just such an existence for the indefinite future, perhaps decades, because he failed to predict, with sufficient "specificity," his future medical condition. This decision is at odds with decisions of this Court and of other state

supreme courts, and raises a fundamental question of constitutional law that this Court recognized but expressly declined to reach in *Cruzan*.

In *Cruzan*, this Court held that the State did not violate a patient's constitutionally protected liberty interest in refusing unwanted medical treatment by requiring proof, by clear and convincing evidence, of the patient's prior expressed intent to refuse treatment. In the decision below, the Michigan Supreme Court deliberately ignored the fact that Michael has a constitutionally protected liberty interest in having his treatment wishes respected. App. 11a. Moreover, the court required proof that the patient actually anticipated the "specific circumstances" of his incapacity, specificity far beyond what other state supreme courts have required in connection with decisions to withdraw life-sustaining treatment. Without ever explaining what was missing in Michael's expression of his wishes, the Michigan Supreme Court established and applied a standard of proof that unduly interfered with Michael's exercise of his liberty interest, see *Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2804 (1992), and deprived him of adequate notice of the State's requirements for protecting his liberty interest. Finally, by ignoring the overwhelming evidence that Michael wanted his wife, Mary, to take responsibility for making his medical treatment decisions in the event of his incapacity, the decision below raises the question expressly left open in *Cruzan*: Whether a State is required to "defer to the decision of a surrogate if competent and probative evidence establishe[s] that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual." *Cruzan*, 497 U.S. at 287 n.12.

I.

In *Cruzan*, this Court held that the Due Process Clause of the Fourteenth Amendment establishes a "liberty interest" that "would grant a competent person a constitu-

tionally protected right to refuse [medical treatment, including] lifesaving hydration and nutrition." *Id.* at 279. As Justice O'Connor further explained in her concurring opinion:

> Artificial feeding cannot readily be distinguished from other forms of medical treatment. . . . A gastrostomy tube . . . must be surgically implanted into the stomach or small intestine. . . . Requiring a competent adult to endure such procedures against her will burdens the patient's liberty, dignity, and freedom to determine the course of her own treatment. Accordingly, the liberty guaranteed by the Due Process Clause must protect, if it protects anything, an individual's deeply personal decision to reject medical treatment, including the artificial delivery of food and water.

Id. at 288-89 (concurring opinion) (citations omitted).

The Court further acknowledged that competent persons may generally refuse medical treatment even to the risk of death, because the " 'right to self-determination ordinarily outweighs any countervailing state interests . . . .' " *Id.* at 273 (quoting *In re Conroy*, 486 A.2d 1209, 1225 (N.J. 1985)). Nevertheless, the Court concluded that, in determining the proper balance between those competing interests after a person becomes incompetent, a State may "require clear and convincing evidence of the patient's wishes" before authorizing withdrawal of nutrition and hydration. *Id.* at 286.

Although the Michigan Supreme Court purported to apply *Cruzan* in requiring proof of Michael's wishes by clear and convincing evidence, its unexplained conclusion that Michael's wishes could not be enforced because he did not refer to the "specific circumstances" to which he is now confined, unjustifiably extends *Cruzan*'s holding and effectively denies Michael his constitutionally protected interest in being free from invasive and unwanted medical treatment. In effect, the decision of the Michigan

Supreme Court transforms the clear and convincing evidence standard into one that requires proof "beyond all doubt." No state supreme court has required specificity of the kind now required in Michigan, nor can such a requirement withstand constitutional scrutiny.

As Justice Levin noted in his dissent below, App. 34a-35a, "other courts have found clear and convincing evidence" of a prior expressed wish to refuse treatment on facts far less compelling than those proved by Mary. In *Elbaum* v. *Grace Plaza, Inc.*, 544 N.Y.S.2d 840 (N.Y. App. Div. 1989), the patient, Jean Elbaum, advised her husband, at a time when she was competent, that she never wanted "to be sustained as a 'vegetable' " and that she wanted to " 'die with some dignity.' " *Id.* at 844. Mrs. Elbaum also made her husband and her sister pledge to her that they would not permit her to be tube-fed in a condition similar to the one in which she existed at the time of the judicial proceedings.

Although the trial court determined that there was insufficient proof that Mrs. Elbaum had made a firm decision not to have a feeding tube if she were to lapse into a persistent vegetative state, the appellate court disagreed. The appellate court found that Mrs. Elbaum's statements satisfied New York's "clear and convincing" standard of proof. In doing so, it pointed to the promises which Mrs. Elbaum extracted from her husband and other family members, and concluded that they reflected "a serious and and consistent purpose of mind and an intent to bind others to effectuate her desires." *Id.* at 846.

Similarly, in *In re Tavel*, 661 A.2d 1061 (Del. 1995), decided just three weeks before the Michigan Supreme Court rendered its *Martin* decision, the Delaware Supreme Court found clear and convincing evidence of the patient's intent to decline artificial feeding, based upon proof that the patient " 'would never want to be dependent on anybody for anything' " and that the patient insisted that her daughter "promise never to let her become helpless and

dependent like people they had visited in nursing homes." *Id.* at 1065. See also *In re Swan*, 569 A.2d 1202, 1205-06 (Me. 1990) (17 year old's two oral statements not to be maintained artificially, found clear and convincing).

It is difficult to discern any meaningful difference in the proofs in *Elbaum, Tavel*, and *Swan*, on the one hand, and *Martin*, on the other. All of the patients expressed the desire not to be kept alive by artificial means once they became entirely dependent on machines and the care of others for survival, and all made close family members promise not to permit such a fate to befall them. Indeed, the patients' statements in the prior cases are, if anything, fewer in number and less precise and unequivocal than those of Michael Martin. The decision below thus illustrates that there is no consistent application of the "clear and convincing" standard from state to state, and that the evidentiary standard easily can be manipulated to deny withdrawal of treatment, particularly where, as here, the constitutional dimensions of the underlying liberty interest in refusing treatment are ignored.

This distortion of the clear and convincing evidence standard is a matter of fundamental importance because "[i]n cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Addington* v. *Texas*, 441 U.S. 418, 425 (1979) (alterations in original) (quoting *Tippett* v. *Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)). By ratcheting up the required proof to satisfy this standard, the court below denigrated Michael's important liberty interest in making his own medical treatment decisions.

The simple reality is that no person has a crystal ball. Michael, by repeatedly discussing his treatment preferences with his wife, and by repeatedly making her promise that she would take responsibility for seeing that his wishes were carried out, did more than most Americans in

planning against future tragedy. He cannot be faulted for not reducing his preferences to writing, for at the time of his accident, the Michigan legislature had not provided statutory authorization for living wills or for medical durable powers of attorney. And most important, he cannot reasonably have been expected to foresee and describe, with any greater detail than he in fact provided, the specific conditions under which he would want to call a halt to his medical treatment. Lack of specificity is inescapable in any attempt to predict one's medical future: The future is inherently speculative, medical diagnoses are frequently disputed, and the likely outcomes of different courses of treatment are uncertain. The finding of the Michigan Court of Appeals, that Michael's condition of permanent "dependen[cy] upon others or machines for his basic needs" is both the condition in which he wanted treatment removed and "exactly the condition in which Michael now finds himself," App. 50a, surely is sufficient to satisfy any standard of proof a State may constitutionally impose.

For the Michigan Supreme Court to require additional specificity in Michael's description of his condition guarantees that many competent persons will be unable to ensure protection of their liberty interest in refusing life-sustaining medical treatment upon incompetency. The Michigan Supreme Court's "specific circumstances" standard thus constitutes "undue interference" with, and a "substantial obstacle" to the exercise of, a patient's liberty interest in controlling his medical treatment. See *Planned Parenthood* v. *Casey*, 112 S. Ct. 2791, 2804 (1992).

The Michigan standard is also inconsistent with the fundamental due process requirement that states provide citizens with adequate notice of the steps they must take in order to protect their liberty interests. See *Lambert* v. *California*, 355 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of notice."). By introducing a previously unannounced

obstacle to refusing treatment long after Michael Martin could attempt to comply with it, Michigan unconstitutionally denied him a fair opportunity to protect his interests. This Court should grant the petition to establish that Michigan's "specific circumstances" test unduly burdens the ability of all individuals, but especially those whose incapacity predates the decision, to preserve their liberty interest in being free of unwanted medical treatment.

II.

The decision below should be reviewed for yet a second reason. It raises the question this Court expressly left open in *Cruzan*: Whether a State has a constitutional obligation to "defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual." *Cruzan*, 497 U.S. at 287 n.12. The Court did not need to reach that question in *Cruzan* because Nancy Cruzan's accident occurred without her ever making someone promise not to let her linger on life-support, or otherwise indicating whom she wanted to act in her behalf. Justice O'Connor wrote separately

> to emphasize that the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decisionmaker. . . . In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment.

Id. at 289 (concurring opinion) (citation omitted).

The Michigan Supreme Court ignored this vital point. It failed to consider that Michael wished to have his wife, Mary, and not the Michigan Supreme Court or some other unfamiliar and distant authority, make his treatment decisions. Michael's repeated requests that Mary promise that she would not let him be maintained on machines in a helpless and hopeless condition, unable to care for him-

self, and his repeated warnings that he would haunt her forever if she broke that promise, constitute competent and probative evidence that Michael wanted Mary, and no one else, to take charge of his treatment decisions if he were unable to do so.

Notably, the adoption of a medical durable power of attorney statute, which many states (including Michigan [9]) have enacted, does not make the issue reserved in *Cruzan* any less pressing. For one thing, "[f]ew individuals provide explicit . . . written instructions regarding their intent to refuse medical treatment should they become incompetent." *Cruzan*, 497 U.S. at 289 (O'Connor, J., concurring). Notably, Michigan's medical proxy statute, like most in the country, does not purport to constitute the exclusive means by which a surrogate may act for another insofar as termination of life-sustaining treatment is concerned.[10] Furthermore, the mere existence of such a statute does not guarantee that comparable restrictions will not be placed on the discretion of a surrogate. Indeed, the Michigan Supreme Court indicated in the decision below its intent to impose a requirement on statutory surrogates comparable to the "specific circumstances" restrictions it now imposes on surrogates under the common law. See App. 13a ("A proper designation allows a third person to execute the patient's treatment decisions, even if the decision will result in death, provided the patient is in the condition delineated in the patient advocate designation"). By adopting that interpretation, the Michigan

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[9] The Michigan statute is Mich. Comp. Laws Ann. § 700.496; Mich. Stat. Ann. § 27.5496 (adopted in 1990, three years after Michael's accident). Michigan still does not have any statute that explicitly recognizes living wills.

[10] *See* Mich. Comp. Laws Ann. § 700.496(18) and (21); Mich. Stat. Ann. § 27.5496(18) and (21). To the same effect, *see In re Tavel*, 661 A.2d 1061, 1067 (Del. 1995) ("[T]he [Delaware Death With Dignity] Act was not intended to affect the rights of persons who do not choose to take advantage of its provisions.")

Supreme Court perpetuates the very problem that deference to a surrogate is intended to solve, *viz.*, the inability of any patient precisely to predict his future condition and the options he will face.

The interventionist approach adopted by the Michigan Supreme Court seems particularly misplaced here, where the surrogate is the wife of the patient. "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit . . . ." *Parham* v. *J.R.*, 442 U.S. 584, 602 (1979). Therefore, the law has traditionally presumed that "natural bonds of affection" [11] will lead one spouse to act in the best interests of the other. See 1 Alan Meisel, *The Right to Die*, 199-200, 205-06 (2d ed. 1995); *Cruzan*, 497 U.S. at 328 (Brennan, J., dissenting). While the State admittedly possesses constitutional authority to ensure that a surrogate is not acting wrongfully, that authority does not extend to substituting its judgment for the surrogate's. Certainly, nothing in this Court's decision in *Cruzan* authorized such a radical departure from traditional norms regulating personal treatment decisions.

This case well illustrates the vital importance of resolving the question left open in *Cruzan*. Michael is plainly someone who did not want to be "a captive of the machinery required for life-sustaining measures or other medical interventions." *Cruzan*, 497 U.S. at 288 (O'Connor, J., concurring). Thus, even assuming that the Michigan Supreme Court was within the bounds of constitutional discretion in requiring individuals to predict in advance their "specific circumstances" in order to preserve their liberty interest, it plainly erred when it stopped its analysis there. As Justice O'Connor has observed:

> States which decline to consider any evidence other than such instructions [regarding treatment choices in

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[11] *Parham*, 442 U.S. at 602 (citing 1 William Blackstone, *Commentaries* at *447; 2 James Kent, *Commentaries on American Law* at *190).

> particular circumstances] may frequently fail to honor a patient's intent. Such failures might be avoided if the State considered an equally probative source of evidence: the patient's appointment of a proxy to make health care decisions on her behalf. Delegating the authority to make medical treatment decisions to a family member or friend is becoming a common method of planning for the future.

497 U.S. at 290 (concurring opinion). The reality is that for most individuals, the ability to effectuate treatment preferences through surrogates is vital to protecting their liberty interests.

This Court should therefore grant the petition to take up the issue it deliberately left open in *Cruzan* and determine whether, in fact, States are constitutionally required to defer to competent and probative evidence that a patient intended to have another person act on his behalf in making medical treatment decisions.

* * * *

When all is said and done, it is fair to ask "what more could Michael have done to protect his liberty interest?" For years, Michael expressed his unwavering rejection of being preserved indefinitely by artificial means, if such treatment would not serve to promote his recovery. He demanded that his wife promise that she would never abandon him to such a fate. His State provided him no statutory option to create a living will or to execute a medical durable power of attorney. He sought to protect his liberty interest by ensuring that his wife understood his wishes and was committed to defending them.

The determined resistance of the Michigan Supreme Court to acknowledge the force of Michael Martin's statements and choices, its establishment of an unduly burdensome "specific circumstances" test, and its refusal to consider Michael's obvious desire to have his wife, and not a remote panel of state officials, make medical decisions for him, do violence to Michael's efforts to assert his

constitutionally protected liberty interest in being free from unwanted medical treatment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 20, 1995

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APPENDICES

APPENDIX A

Filed August 22, 1995

MICHIGAN SUPREME COURT
Lansing, Michigan 48909

Chief Justice James H. Brickley

Nos. 99699, 99700

IN RE MICHAEL MARTIN,
A LEGALLY INCAPACITATED PERSON

MARY MARTIN, Guardian and Conservator of
MICHAEL MARTIN,
Petitioner-Counter
Respondent-Appellee,

v

LEETA M. MARTIN and PATRICIA MAJOR,
Respondents-Counter
Petitioners-Appellants.

OPINION

BEFORE THE ENTIRE BENCH

MALLETT, J.

We granted leave in this case to consider whether life-sustaining treatment in the form of a gastrostomy tube that provides nutritive support should be removed from a

conscious patient who is not terminally ill or in a persistent vegetative state, but who suffers from a mixture of cognitive function and communication impairments that make it impossible to evaluate the extent of his cognitive deficits.[1]

The trial court determined that there was clear and convincing evidence that, before his injuries, Michael Martin "expressed [a medical] preference to decline life-sustaining medical treatment under the circumstances presented . . . ." [2] The Court of Appeals affirmed the trial court's determination.[3]

After painstaking review of the facts of this case, we reverse the Court of Appeals decision because we conclude that there is not clear and convincing proof that Michael made a firm and deliberative decision, while competent, to decline medical treatment in these circumstances.

As we begin our analysis, we are mindful that the paramount goal of our decision is to honor, respect, and fulfill the decisions of the patient, regardless of whether the patient is currently competent. The decision to accept or reject life-sustaining treatment has no equal. We enter this arena humbly acknowledging that neither law, medicine nor philosophy can provide a wholly satisfactory answer to this question.

To err either way has incalculable ramifications. To end the life of a patient who still derives meaning and enjoyment from life or to condemn persons to lives from which they cry out for release is nothing short of barbaric. If we are to err, however, we must err in preserving life.

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[1] 447 Mich 879 (1994).

[2] 205 Mich App 96, 98-99; 517 NW2d 749 (1994).

[3] *Id.* at 112.

I

The Court of Appeals opinion presents an accurate and thorough summary of the facts:

> Petitioner and Michael Martin were married in 1972 and therefter had three children. On January 16, 1987, Michael sustained debilitating injuries in an automobile accident, with the most serious being a closed head injury affecting the bilateral hemisphere of his brain. The injuries significantly impaired his physical and cognitive abilities, left him unable to walk or talk, and rendered him dependent on a colostomy for defecation and a gastrostomy tube for nutrition. Petitioner was appointed Michael's legal guardian and conservator. Michael resided at different nursing homes for the first few years after the accident until July 1990, when he was transferred to the New Medico Neurological Center (NMNC) in Howell, Michigan, where he was still residing at the time of the hearing.
>
> On January 9, 1992, while Michael was being treated at Butterworth Hospital for an obstructed bowel, petitioner contacted the hospital's bioethics committee for the purpose of determining whether Michael's life-sustaining medical treatment should be withdrawn. On January 15, 1992, after consulting with petitioner, a family friend, a social worker, Michael's treating physician, and nurses at Butterworth Hospital, the committee issued a report stating that withdrawal of Michael's nutritive support was both medically and ethically appropriate, but that court authorization would be required before the hospital would assist in the procedure. None of the personnel at the NMNC and no other members of Michael's family were consulted or notified by the committee.
>
> On March 19, 1992, petitioner filed a petition in the probate court, requesting authorization to with-

draw Michael's nutritive support. Respondents Leeta Martin and Patricia Major, who are Michael's mother and sister respectively, opposed the petition and also filed a petition of their own asking that Mary Martin be removed as Michael's guardian and conservator. An evidentiary hearing was held from October 13, 1992, through October 30, 1992, regarding the petition for authority to withdraw Michael's nutritive support.

Petitioner said that Michael was a private but active person before the accident. She claimed that he was always bothered by, and intolerant of, people who were disabled or dependent on others and often stated that he would rather die than be dependent on people and machines. According to petitioner, Michael would not want to be kept alive in his present condition. Two co-workers of Michael each testified that he had remarked to them before the accident that he would not want to continue living in a vegetative state. The remark was made to one of the co-workers during a casual conversation around the lunch table and to the other while discussing someone else who had been severely injured. Both co-workers testified that Michael's present condition is not the type Michael was referring to in the conversations before his accident. Respondent Patricia Major admitted that Michael once told her that he would not want to be kept alive by a respirator if he were in a coma.

Conflicting testimony was presented regarding Michael's current level of physical, sensory, emotional, and cognitive functioning. At one extreme, Dr. Joseph Fischhoff, who is head of the Department of Psychiatry at Wayne State University and the chairman of the bioethics committee at Children's Hospital in Detroit, testified that Michael has no voluntary control over any of his limbs, or any abil-

ity to function on a voluntary level, and therefore lacks any meaningful interaction with his environment. However, Dr. Robert Kreitsch, who is the director of the Brain Injury Rehabilitation Program at the Mary Free Bed Rehabilitation Center, testified that Michael demonstrated an ability to carry out some voluntary motor commands on his right side, including the ability to pinch and grasp, as well as the ability to recognize faces, respond emotionally, and communicate with others with head nods. According to Dr. Kreitsch, Michael seemed content with his evironment and indicated "no" with a head nod when asked whether he has been in any pain or discomfort, and also when asked if there were ever any times when he felt that he did not want to go on living. Other medical experts also presented differing opinions regarding Michael's level of functioning, but generally described it as falling somewhere between that described by Drs. Fischhoff and Kreitsch. All medical experts agreed that Michael was not in a persistent vegetative state or terminally ill.

Petitioner, several therapists from the NMNC, and several lay witnesses all described an apparent limited ability by Michael to interact with others and to respond to simple yes or no questions with head nods; their testimony varied, however, with respect to the consistency and appropriateness of the perceived interactions and responses. The trial judge personally visited and questioned Michael at the NMNC on October 14, 1992. The judge explained on the record how Michael had moved both his right arm and right leg on command, and how he had responded with appropriate head nods to a series of yes or no questions. Witnesses also testified that there are times when Michael becomes completely withdrawn and does not respond to any stimuli.

> In a decision delivered from the bench on October 30, 1992, the trial court ruled that clear and convincing evidence had been presented that Michael did not want to be "kept a dependent person" and that his present condition "falls within what Michael did not want to be." Nonetheless, the court held that Michael's intentions could not be considered because they were not expressed in writing. The trial court further ruled that withdrawal of nutritive support was in Michael's best interests, but that, absent being terminally ill, a best interests standard could not be applied as a matter of law. Accordingly, the trial court denied the petition for authority to withdraw Michael's nutritive support. The trial court then proceeded to also deny respondents' petition for removal of Mary Martin as Michael's guardian and conservator. The court concluded that her "decision-making process" relative to the decision to withdraw life-sustaining medical treatment was not inappropriate. Motions for reconsideration brought by both sides, including a request by respondents for specific factual findings, were thereafter denied. [200 Mich App 703, 706-710; 504 NW2d 917 (1993).]

The Court of Appeals remanded the case "for further and more specific findings of fact and conclusions of law regarding Michael's decision-making capacity . . . [,] present condition or his present level of physical, sensory, emotional, and cognitive functioning." *Id.* at 717-718.

On remand, additional evidence and medical testimony were presented to the trial court. The Court of Appeals aptly summarized the hearing testimony as follows:

> According to Dr. William Vandenberg, a physical medicine and rehabilitation specialist who works extensively with head-injured patients, Michael can understand only very short and very simple questions and cannot accurately comprehend questions

that are lengthy, verbose, or that require the retention of multiple thoughts. Similar testimony was provided by Dr. Donald Rutherford, who is the medical director at the Glenwood Christian Nursing Home where Michael resides. Dr. Robert Kreitsch, who was one of respondents' main experts, likewise described Michael's levels of cognition and comprehension as being limited to "very, very simple terms" and "some simple short phrases." According to Dr. Kreitsch, given Michael's memory deficiencies and inability to retain information, Michael is incapable of processing the necessary information to fully understand his condition. Drs. Vandenberg, Rutherford, and Kreitsch uniformly agreed that Michael does not possess the requisite capacity to satisfy the four-part test for evaluating decision-making capacity.

This same conclusion was also reached by Dr. Ronald Cranford, a neurologist, whose testimony was accorded significant weight by the trial court. Dr. Cranford provided detailed testimony describing not only Michael's condition and level of functioning from a medical standpoint, but also the process involved in assessing Michael's cognitive capabilities during a recent evaluation. Dr. Cranford's evaluation demonstrated that, consistent with the testimony of the other medical experts, Michael possesses an ability to understand some simple questions concerning basic and familiar items, although even then his responses are not always consistent, but that he lacks an understanding of more complex items, including his physical capabilities and medical condition.

Although one of respondents' experts, Dr. Walter Zetusky, a neuropsychologist, testified that he evaluated Michael in 1990 and determined that he had an intelligence quotient of sixty-three, thus placing him at a higher level of cognitive functioning than that

described by the other medical experts, the trial court accorded little probative value to the IQ testing. Significantly, the trial court noted that other medical experts questioned the validity of any IQ testing of Michael, and, further, that another expert, Dr. David Winstrom, in fact attempted to perform similar testing on Michael in April 1993, but was unable to do so, given Michael's inability to respond at a significant level to permit testing. More importantly, the trial court observed that not even Dr. Zetusky was able to provide unqualified testimony indicating that Michael has sufficient capacity to satisfy the four-part test for evaluating decision-making capacity.

Finally, it was the general consensus among the medical experts that Michael's condition and cognitive level of functioning will not improve in the future.

* * * *

Testimony was received from respondent Major as well as two of Michael's former co-workers describing statements made by Michael before his accident wherein he expressed a preference not to be maintained in a coma or in a vegetative state. The trial court found . . . that Michael's present circumstances do not conform to those described by Michael when making those prior statements. However, testimony was also received from petitioner, who described numerous statements that were made to her by Michael before his accident, on different occasions and in different settings and contexts, all expressing a preference not to be maintained under various described circumstances. According to petitioner, Michael was adamant and made it very clear that he did not want to be kept alive in the circumstances described. The trial court found that the statements were sufficient in detail to establish Michael's previously expressed preference to decline

> life-sustaining medical treatment under the present circumstances. . . .
>
> Prevalent throughout Michael's statements is the preference not to be maintained in a condition where he was incapable of performing basic functions such as walking, talking, dressing, bathing, or eating, and, instead, was dependent upon others or machines for his basic needs. . . .
>
> Michael's discussions also reveal an express preference not to be maintained by machines in order to be kept alive. [205 Mich App 96, 100-104; 517 NW2d 749 (1994).

On remand, after evaluating the evidence, the trial court found that the petitioner had demonstrated by clear and convincing evidence that, before his injuries, Mr. Martin expressed a medical preference to decline life-sustaining medical treatment under the circumstances presented.[4] The Court of Appeals concluded that, before his injuries, Mr. Martin specifically described circumstances under which he would decline life-sustaining medical treatment.[5] It stated that Mr. Martin's present condition fit squarely within the parameters that Mr. Martin specifically described.[6] Therefore, it held that the trial court's determination was not clearly erroneous.[7]

B

Although this case essentially concerns whether the appropriate evidentiary burden of proof has been met to support the lower courts' findings, the evidentiary issue may not be reached without first ascertaining whether the patient has a right to refuse life-sustaining medical treatment, and, if so, whether a surrogate decisionmaker may

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[4] 205 Mich App 98-99.

[5] *Id.* at 104.

[6] *Id.*

[7] *Id.* at 102, 105-106.

exercise that right for a patient who is no longer able to do so for himself. After determining the extent of the right to decline life-sustaining medical treatment, we must decide how the surrogate is to effectuate the incompetent patient's decision, discern the appropriate evidentiary standard of proof, and determine whether the evidentiary standard has been satisfied in this case.

II

A

The right to decline life-sustaining treatment has been based on constitutional, common-law, and statutory sources. The Court of Appeals in *In re Rosenbush*, 195 Mich App 675, 680; 491 NW2d 633 (1992), delineated the three sources of the right as follows:

> (1) the common-law right to freedom from unwanted interference with bodily integrity,
>
> (2) the constitutional right to privacy or liberty, or
>
> (3) statute.

By deciding that Michigan recognizes "a right to withhold or withdraw life-sustaining medical treatment as an aspect of the common-law doctrine of informed consent," the *Rosebush* Court found it "unnecessary to decide the validity of the constitutional or statutory bases in Michigan." *Id.* at 680, n 1. As a prominent commentator in this area has noted, "the legal basis for the right to die is not important because courts have not made the scope of the right depend on whether or not the source is common-law[, statutory,] or constitutional." Meisel, The Right to Die, § 3.4, p 50.[8] Because the evidentiary and

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[8] Whether a patient's prerogative to spurn life-preserving treatment is grounded on constitutional privacy or on the common law doctrine of informed consent, the object remains to honor individual dignity by promoting self-determination and choice. [Cantor, Legal Frontiers of Death and Dying, ch 3, p 63.]

decision-making standards appropriate in a given case do not depend on the source of the right, we need only ground the right in one source.

We agree with the *Rosebush* Court that a necessary corollary of the common-law right to informed consent is the right not to consent.[9] See *Cruzan* v *Director, Missouri Dep't of Health*, 497 US 261, 270; 110 S Ct 2841; 111 L Ed 2d 224 (1990); *Werth* v *Taylor*, 190 Mich App 141; 475 NW2d 426 (1991); *In re Conroy*, 98 NJ 321, 346-348; 486 A2d 1209 (1985); Meisel, *supra*, § 3.3, p 47, n 20. As noted by the Arizona Supreme Court:

> The purpose underlying the doctrine of informed consent is defeated somewhat if, after receiving all information necessary to make an informed decision, the patient is forced to choose only from alternative methods of treatment and precluded from foregoing all treatment whatsoever. [*Rasmussen* v *Fleming*, 154 Ariz 207, 216; 741 P2d 667 (1987).]

Thus, because we find that the common-law doctrine of informed consent allows a person to refuse life-sustaining treatment, we also decline the invitation to reach the propriety of the constitutional and statutory issues in this case.

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[9] While the patient's right to refuse life-sustaining medical treatment is not absolute and must be balanced against the countervailing interests of the state, see Meisel, *supra*, supp, p 24; *Cruzan* v *Director, Missouri Dep't of Health*, 497 US 261, 280-281, 283; 110 S Ct 2841; 111 L Ed 2d 224 (1990), by concluding that clear and convincing evidence is necessary to establish what the patient did decide, and finding such evidence lacking in this case, we need not address the interaction between the state's interest and a patient's decision to forgo treatment.

The state's interest is in the preservation of life. Given the absence of clear and convincing evidence about what Michael would do in this case, the state's interests and Michael's interest are not in conflict, and therefore no balancing is necessary.

Given that a competent patient may decide to refuse medical treatment, the next inquiry is whether a decision to refuse medical treatment under the particular circumstances, made while competent, should be honored when the patient is incompetent.[10] Other jurisdictions that have addressed this question have unanimously concluded that a decision to refuse medical treatment in future situations, made while competent, is not lost because of incompetency or the inability to communicate. See *Rasmussen, supra* at 219; *In re Eichner* v *Dillon*, 73 AD2d 431, 470; 426 NYS2d 517 (1980) ("To deny the exercise because the patient is unconscious is to deny the right"); *Conroy, supra* at 359-361. We wish to make clear that we are deciding only that to the extent the right to refuse medical treatment "refers to decisions already made and communicated by the patient before losing the capacity to make further choices, . . . it is true that the patient's interest in having those choices honored must survive incapacity." Bopp & Avila, *Perspectives on* Cruzan: *The sirens' lure of invented consent: A critique of autonomy-based surrogate decisionmaking for legally-incapacitated older persons*, 42 Hastings L J 779, 806 (1991).

A third person must implement an incompetent patient's previously expressed decisions. Michigan's patient

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[10] While both the petitioner and the respondent urge us to decide whether Michael's current actions express a present desire to accept treatment to the extent that he has repudiated any previous decision, we need not reach this question because we find that Michael's previous statements do not clearly and expressly demonstrate that he would want treatment withheld under these circumstances.

Although we question the standard the Court of Appeals applied to determine that Michael was unable to express a current desire to accept treatment, for purposes of this case we except the lower courts' determinations that Michael is incompetent to make medical treatment decisions. The standard created by the Court of Appeals, in application, is equivalent to a general competency standard, a standard that has generally been rejected. See Meisel, *supra*, § 2.16 at 31-32.

advocate act, MCL 700.496; MSA 27.5496, supports allowing a third person to execute the decisions of patients who are no longer able to effectuate those decisions for themselves. Pursuant to the patient advocacy act,[11] a currently competent person designates a surrogate, the patient advocate, to make treatment decisions in the event the patient is incapacitated. A proper designation allows a third person to execute the patient's treatment decisions, even if the decision will result in death, provided the patient is in the condition delineated in the patient advocate designation.

III

Having concluded that a person's right to refuse life-sustaining medical treatment survives incompetency and may be discharged by a surrogate decisionmaker, we now address how the surrogate effectuates the incompetent patient's decision.

While the facts of this case present an issue of first impression in Michigan, we find guidance in the decisions of our sister states that have addressed the possible surrogate decisionmaking standards.

Courts have created "two traditional [decisionmaking] standards for guiding guardians in carrying out their responsibilities: the best interests standard and the substituted judgment standard." Meisel, *supra*, § 9.6 at 264.[12]

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[11] We are careful to note that Michael did not designate a patient advocate pursuant to the act because his injury occurred nearly four years before this legislation was enacted. We express no opinion about how the act and its provisions should be interpreted because that question is not before us.

[12] Contrary to a growing misconception, see *DeGrella* v *Elston*, 858 SW2d 698 (Ky, 1993); *In re Rosebush*, *supra* at 688, n 7; *In re Fiori*, 438 Pa Super 610, 651; 652 A2d 1350 (1995); Meisel, *supra*, cum supp, p 284, we view the clear and convincing standard not as a decisionmaking standard, but as an evidentiary standard

The best interest standard [13] is an objective analysis under which the benefits and burdens to the patient of treatment are assessed by the surrogate in conjunction with any statements made by the patient if such statements are available. *Conroy, supra* at 360-368. The best interest analysis is generally invoked, if at all, only as a secondary approach when subjective evidence of a particular patient's decision is lacking because it involves a qualitative assessment of the patient's condition, a decision the state may legitimately decline to make. *Cruzan, supra* at 282.

The substituted judgment standard has subjective and objective components. Through this standard, the surrogate attempts to ascertain, with as much specificity as possible, the decision the incompetent patient would make if he were competent to do so. The surrogate first determines whether the patient, while competent, explicitly stated his intent regarding the type of medical treatment

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of proof that applies to all decisions regarding termination of treatment, regardless of the decisionmaking standard employed.

> In right to die cases, if intent to withdraw life prolonging medical procedures is determinative of the case, then there must be "clear and convincing evidence" of that intent. If "best interests" of the patient is determinative of the case, then there must be "clear and convincing evidence" that discontinuance of medical procedures best serves the interests of the patient. [Gorby, *Admissibility and weighing evidence of intent in right to die cases*, 6 Issues in Law & Medicine 33, 43 (1990).]

[13] The *Conroy* court separated the best interest standard into two separate strands: the "limited objective" standard and the "pure objective" standard. The limited objective standard first examines any statements made by the patient that do not amount to clear and convincing evidence, as required by the pure subjective standard, and incorporates an objective assessment of the benefits and burdens to the patient of continued treatment. *Id.* at 365-366. Under the pure objective standard, treatment may be withdrawn where the burdens of treatment clearly outweigh any benefits to the patient. *Id.* Given that both these standards employ objective criteria, factors we decline to address under the facts of this case, the differences between these two standards are not relevant.

in question. *In re Westchester Co Medical Center*, 72 NY2d 517; 534 NYS2d 886; 531 NE2d 607 (1988). Where there is no explicit evidence of what the patient would choose, the surrogate may still decide to terminate treatment on the basis of evidence of the patient's "value system." *In re Longeway Estate*, 133 Ill 2d 33, 49; 549 NE2d 292 (1989). The surrogate should determine the patient's "value system" through an assessment of the patient's behavior during the time he was competent

> "including his or her philosophical, religious and moral views, life goals, values about the purpose of life and the way it should be lived, and attitudes toward sickness, medical procedures, suffering and death . . . ." [*In re Jobes*, 108 NJ 394, 415; 529 A2d 434, 445 (1987), quoting Newman, *Treatment refusals for the critically ill: Proposed rules for the family, the physician and the state*, III N Y L S Human Rights Annual 45-46 (1985).]

Courts have generally acknowledged that the substituted judgment standard entails some level of objective analysis. *Conroy, supra* at 363-364. For this reason, commentators, as well as many judges, have forcefully assailed the substituted judgment standard as a legal fiction that in reality substitutes the surrogate's decision to withdraw treatment for that of the patient. See Bop & Avilla, *supra; Cruzan, supra* at 285; *DeGrella* v *Elston*, 858 SW2d 698, 710-711 (Ky, 1993) (Lambert, J, concurring); *In re Longeway Estate, supra* at 55 (Ward, J, dissenting), at 65 (Clark, J, dissenting).

Rather than choose between the best interest standard and the substituted judgment standard, the New Jersey Supreme Court attempted to synthesize these two standards by creating an hierarchial decision-making continuum. *Conroy, supra.* The starting point on the continuum is anchored by a purely subjective analysis, an approach that requires more definitive evidence of what

the patient would choose than the substituted judgment standard. The other end of the continuum is anchored by a purely objective analysis, which is, in essence, a best interest standard.

We find that a purely subjective analysis is the most appropriate standard to apply under the circumstances of this case. The pure subjective standard allows the surrogate to withhold life-sustaining treatment from an incompetent patient "when it is clear that the particular patient would have refused the treatment under the circumstances involved." *Conroy, supra* at 360. Given that the right the surrogate is seeking to effectuate is the incompetent patient's right to control his own life, "[t]he question is not what a reasonable or average person would have chosen to do under the circumstances but what the particular patient would have done if able to choose for himself.' *Id.* at 360-361. The patient's statements, made while competent, must illustrate "a firm and settled commitment to the termination of life supports under the circumstances like those presented." *In re Westchester Co Medical Center, supra* at 531.

The subjective and objective standards involve conceptually different bases for allowing the surrogate to make treatment decisions. The subjective standard is based on a patient's right to self-determination, while the objective standard is grounded in the state's parens patriae power. *Conroy, supra, Cruzan* v *Harmon* 760 SW2d 408 (Mo, 1988). An objective, best interest, standard cannot be grounded in the common-law right of informed consent because the right and the decisionmaking standard inherently conflict. The Illinois Supreme Court recently explained this conflict:

> The problem with the best-interests test is that it lets another make a determination of a patient's quality of life, thereby undermining the foundation of self-determiniation and inviolability of the person

> upon which the right to refuse medical treatment stands. [*In re Longeway Estate, supra* at 49.][14]

Thus, while the facts of the present case do not require that we decide whether the state's parens patriae authority may be expansive enough to encompass a best interest analysis, we do note that such an analysis cannot be based on the common-law right of informed consent.

Although respondent accurately notes that the Florida Supreme Court in *In re Guardianship of Browning*, 568 So 2d 4, 13 (Fla, 1990), believed that the common-law right of self-determination "cannot be qualified by the condition of the patient," any move from a purely subjective standard to an analysis that encompasses objective criteria is grounded in the state's parens patriae power, not in the common-law right of informed consent or self-determination. Thus, while the clearly expressed wishes of a patient, while competent, should be honored regardless of the patient's condition, we find nothing that prevents the state from grounding any objective analysis on a threshold requirement of pain, terminal illness, foreseeable death, a persistent vegetative state, or affliction of a similar genre.

While the circumstances of some cases have led courts to progress along the decision-making continuum and apply tests that encompass more objective criteria, see *Conroy* and *Rosebush, supra*, the facts of this case do not present us with that situation. In the cases that have applied a more objective test or suggested that an objective test would be proper, the patient generally has been comatose or in a persistent vegetative state, *In re Jobes, supra; In re Torres*, 357 NW2d 332 (Minn, 1984) (terminally ill); *In re Guardianship of Barry*, 445 So 2d

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[14] See also *Conroy, supra* at 364, in which the court stated that "in the absence of adequate proof of the patient's wishes, it is naive to pretend that the right to self-determination serves as the basis for substituted decision-making."

365 (Fla App, 1984) (experiencing great pain); *Conroy, supra* at 365 (very limited life expectancy); *In re Rosebush, supra* (never been competent or able to express her wishes or desires).[15] In this case, Michael's life and health are not threatened by infirmities of this nature. Because he was competent and able to express his wishes and desires, we decline to move along the continuum from the subjective standard.[16]

In all cases where the courts have been persuaded that the patient, while competent, made clear and convincing statements that he would reject treatment under the cir-

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[15] We express no opinion about the proper decision-making standard for patients who have never been competent, patients existing in a persistent vegetative state, patients who are experiencing great pain, or patients who are terminally ill. If a patient has any of these conditions, or ailments of a similar nature, a more objective approach may be necessary and appropriate.

The facts of each case present unique circumstances, and it would be

> unrealistic for us to attempt to establish a rigid set of guidelines to be used in all cases requiring an evaulation of a now-incompetent patient's previously expressed wishes. The number and variety of situations in which the problem of terminating artificial life supports arises preclude any attempt to anticipate all of the possible permutations. [*In re Westchester Co Medical Center, supra* at 529-530.]

[16] Even if a test involving objective criteria were applicable in this case, the objective criteria would only strengthen our decision that nutrition and hydration should continue to be provided. As the court in *Conroy, supra*, noted the burdens to the patient could only outweigh the benefits of continued treatment if

> the patient is suffering, and will continue to suffer throughout the expected duration of his life, unavoidable pain, and that the net burdens of his prolonged life (the pain and suffering of his life with the treatment less the amount and duration of pain that the patient would likely experience if the treatment were withdrawn) markedly outweigh any physical pleasure, emotional enjoyment, or intellectual satisfaction that the patient may still be able to derive from life. [*Id.* at 365.]

By all accounts, Michael is not experiencing any type of pain that would outweigh any enjoyment or pleasure he is experiencing.

cumstances at issue, the patient's decision has been honored, regardless of whether the patient is currently competent. The Kentucky Supreme Court recently noted that all but Missouri [17] and New York [18] would allow treatment to be withdrawn under a substituted judgment standard even where the express wishes of the patient are unclear. *DeGrella, supra.*[19] Missouri and New York only allow treatment to be withheld when it is clear that the particular patient, while competent, expressly decided to reject treatment in the circumstances presented. *In re Westchester, supra* at 531-532; *Cruzan* v *Harmon,* 760 SW2d 426.

The subjective standard has been attacked as possibly creating too stringent a standard, inhumanely condemning a patient to a "prolonged and painful death," *Conroy, supra* at 364, however, the facts of this case do not dictate that we progress beyond a purely subjective standard, and we refuse to do so. We cannot stress too strongly that the complexity and ramifications of any decision in this area caution against moving too swiftly or adopting controversial decision-making standards in cases that do not present facts compelling such decision. The right of informed consent extends only to the decisions this particular patient has made. Any objective analysis is not encompassed within the right of informed consent. As we noted at the outset, if we are to err, we must err in preserving life. Our first step in this area must be a careful one.

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[17] *Cruzan* v *Harmon, supra.*

[18] *In re Storar,* 52 NY2d 363; 420 NE2d 64 (1981); *In re Westchester Co Medical Center, supra.*

[19] It is unclear whether Kentucky adopted the substituted judgment standard in DeGrella. Justice Lambert, concurring, highlighted the inconsistency in the majority's discussion of this issue and explained that because there was clear and convincing evidence of what Ms. DeGrella would choose, it was not necessary for the majority to adopt the substituted judgment standard in that case. *Id.* at 711.

IV

Having concluded that a surrogate may make treatment decisions for a patient who is unable to do so on the basis of that specific patient's statements made while competent, we must now decide the evidentiary standard of proof those statements must meet before the surrogate is allowed to effectuate them.

Proof may be required by a preponderance of the evidence, by clear and convincing evidence, or beyond a reasonable doubt. The predominant evidentiary standard chosen by the courts that have addressed this question, however, is clear and convincing evidence. Meisel, *supra*, § 8.38 at 254. In affirmining the Missouri Supreme Court's choice of the clear and convincing evidence standard, the United States Supreme Court explained why the clear and convincing evidence standard should be chosen over the preponderance standard.

> We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mine civil dispute. [*Cruzan*, 497 US 283.]

Because the party who bears the more stringent burden of proof also bears a greater risk of an adverse decision, the Court found it proper to

> place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment. An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, the discovery of new evidence regarding the patient's intent, changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its

impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction. [*Id.*]

Litigants also have argued for adoption of the "beyond-a-reasonable-doubt standard," [20] although no court has embraced this stringent of a standard. Meisel, *supra*, § 8.38 at 254. Generally, "[t]he 'beyond a reasonable doubt' standard" historically has been reserved for criminal cases," and the Supreme Court has cautioned against "apply[ing] it too broadly or casually in noncriminal cases." *Addington* v *Texas*, 441 US 418, 428; 99 S Ct 1804; 60 L Ed 2d 323 (1979). Because the decision to refuse life-sustaining treatment is not a punitive exercise of the state's authority, we agree that the criminal standard "is inappropriate in cases where the purpose of granting the relief is to give effect to an individual's right by carrying out his stated intentions." *In re Storar*, 52 NY2d 363, 379; 420 NE2d 64 (1981).

We agree that the clear and convincing evidence standard, the most demanding standard applied in civil cases,[21] is the proper evidentiary standard for assessing whether a patient's statements, made while competent, indicate a desire to have treatment withheld.[22] Evidence is clear and convincing when it

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[20] See *Eichner*, *supra* at 472; *Leach* v *Akron Gen Medical Center*, 68 Ohio Misc 1; 426 NE2d 809 (1980).

[21] [I]n civil cases, the clear and convincing evidence standard is typically thought to be the highest level that can be required. Thus, where the threat of deprivation of a fundamental right will trigger proof beyond a reasonable doubt in criminal cases, it would only call for the clear and convincing standard in civil cases. [Forte, *The role of the clear and convincing evidence standard of proof in right to die cases*, 8 Issues in Law & Medicine 183, 188-189 (1992).]

[22] Our conclusion that clear and convincing evidence is the proper standard is in harmony with the patient advocate act, patient would allow treatment to be withheld if such a decision would lead to the patient's death. MCL 700.496(6); MSA 27.5496(6).

> "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been contradicted. [*In re Jobes, supra* at 407-408.]

Among the factors identified as important in defining clear and convincing evidence, see *Westchester, supra*; *Eichner, supra*, the predominant factor is "a prior directive in which the patient addresses the situations in which the patient would prefer that medical intervention cease." Cantor, Legal Frontiers of Death and Dying, ch 3, p 64. Optimally, the prior directive would be expressed in a living will, patient advocate designation, or durable power of attorney. While a written directive would provide the most concrete evidence of the patient's decisions, and we strongly urge all persons to create such a directive, we do not preclude consideration of oral statements, made under the proper circumstances.

The amount of weight accorded prior oral statements depends on the remoteness, consistency, specificity, and solemnity of the prior statement. *Conroy, supra* at 362. The decisionmaker should examine the statement to determine whether it was a well thought out, deliberate pronouncement or a casual remark made in reaction to the plight of another. *In re Westchester Co Medical Center, supra* at 529. Statements made in response to seeing or hearing about another's prolonged death do not fulfill the clear and convincing standard.

> If such statements were routinely held to be clear and convincing proof of a general intent to decline all medical treatment once incompetency sets in, few nursing home patients would ever receive life-

> sustaining medical treatment in the future. The aged and infirm would be placed at grave risk if the law uniformly but unrealistically treated the expression of such sentiments as a calm and deliberative resolve to decline all life-sustaining medical assistance once the speaker is silenced by mental disability. [*Id.* at 532.]

While the degree of similarity between the physical conditions contemplated in the patient's prior statement and the patient's current physical situation also partakes of the fiction of substituted judgment, we do not exclude it as a factor to be considered in assessing the probative value of the prior statement. Only when the patient's prior statements clearly illustrate a serious, well thought out, consistent decision to refuse treatment under these exact circumstances, or circumstances highly similar to the current situation, should treatment be refused or withdrawn. In all events, the proofs in sum must meet the exacting standard of clear and convincing evidence.

V

In the present case, appellants claim that Mr. Martin expressed a preaccident statement that he did not want to live like a vegetable. However, our review of the record reveals that virtually all the witnesses agreed that Mr. Martin is not in a vegetative state and is not suffering from the type of incapacitation referenced in his expression of a desire not to continue life-sustaining medical treatment.

Appellants argue that Mary Martin's uncorroborated affidavit and trial testimony do not constitute clear and convincing evidence of Mr. Martin's preinjury desire to refuse hydration and nutritive support. Appellants argue that, assuming Mary Martin's statements are truthful representations of statements made by Mr. Martin, the remarks,

> if truly made to the Guardian, were remote in time and place from his present circumstances. At the time the remarks were supposedly made, Michael was young and healthy. The remarks were general, vague and casual, because Mr. Martin was not presently experiencing and likely never had experienced the form of "helplessness" he supposedly disliked, and thus, he could not bring to bear his specific views about specific circumstances of which he was intimately knowledgeable. Not being informed by his actual experience, Michael's purported remarks thus were "no different than those that many of us might make after witnessing an agonizing death of another." [Citation omitted.]

Appellee responds that there was no evidence that Mr. Martin's decision regarding prolonged existence on artificial life support has ever changed. Thus, appellee argues that a competent person's strongly held and well thought out decisions about treatment, if proven by clear and convincing evidence, should not be superseded without equally clear and convincing evidence that the person, now incompetent, understands his condition and has changed his mind about previously expressed treatment desires.

Our review of the lower court records reveal that, in determining whether clear and convincing evidence was presented to establish that Mr. Martin had previously expressed a preference to decline life-sustaining medical treatment under the present circumstances, the trial court relied on petitioner's testimony and supporting affidavit in which she stated:

> 4. Discussions between Mike and me regarding what our wishes would be if either of us was ever involved in a serious accident, had a disabling or terminal illness or was dying of old age, began approximately eight years ago. These discussions

occurred on many different occasions. As I indicate below, several were triggered by movies which we saw together. Mike's position was always the same: he did not want to be kept alive on machines and he made me promise that I would never permit it.

5. Some of the conversations that we had about medical care in this context occurred after we watched movies about people who no longer were mentally competent either due to illness, accident, or old age; others involved people who could no longer do anything for themselves, such as persons who lived in a nursing home and could no longer feed or dress themselves and needed to wear diapers or have other measures taken to continue existing. Mike stated to me on several occasions: "That's bullshit, I would never want to live like that." He also said to me, "Please don't ever let me exist that way because those people don't even have their dignity." I always agreed with Mike because I felt the same way.

6. One movie that always triggered such discussions was "Brian's Song" which, I recall, is a movie about a football player with a terminal illness. Mike said to me after we saw it together: "If I ever get sick don't put me on any machines to keep me going if there is no hope of getting better." He also said that if I ever put him on machines to keep him alive: "I'll always haunt you, Mary." Then he would say, "Do you understand?" I always said "Yes." We watched this movie at least two or three times and had virtually the same discussion each time.

7. Some movies that triggered our discussions were about accidents—car accidents, hunting accidents or other accidents near home or in water. Mike was an avid hunter and frequently expressed concerned [sic] about a hunting accident. Mike frequently told me that if he ever had an accident from which he would "not recover" and "could not be the

same person," he did "not want to live that way." He would say, "Mary, promise me you wouldn't let me live like that if I can't be the person I am right now, because if you do, believe me I'll haunt you every day of your life." I stated my promise to him and made him promise me the same.

8. Mike also made a lot of comments to me about never wanting to live "like a vegetable." He said that if anyone had to live like a vegetable, "their families and doctors should be shot for forcing someone to live like that." He would say, "I'd be pissed if I had to live that way." He also told me that he believed it was unfair to the person who had to be kept alive on machines because that person would always be in pain. He told me that "no one should have to be kept alive if they would never get well again."

9. December 1986 was the last time that I remember discussing this subject with Mike. I was having surgery on New Years' Eve Day and we discussed our wishes if either of us was severely incapacitated. The impending surgery prompted me to tell Mike of my wishes not to be maintained artificially. Mike then told me that he would respect my wishes and he expected the same in return if anything ever happened to him.

10. I am certain that were Mike able to speak today, he would direct that the artificial life support and antibiotic treatments be withdrawn so that he might die in a dignified manner consistent with his explicit wishes expressed to me prior to the accident. It is time that my husband be freed from the ghastly, demeaning experience which he so strongly opposed.

11. I know that Mike spoke with some of his co-workers about his disdain for being maintained by artificial means of life support. One of those

> co-workers, Warren Hawley, specifically discussed this with me at the time Mike was admitted to the Grand Valley Nursing Home.

This testimony and affidavit cannot be viewed in a vacuum. There was also testimony from two of Mr. Martin's co-workers, stating that Mr. Martin's present condition is not the type referred to in conversations with them before his injury. Dr. Kreitsch testified that Mr. Martin seemed content with his environment. Dr. Kreitsch, several therapists, and several lay witnesses testified that Mr. Martin could respond to simple yes or no questions by nodding his head. They also testified that he indicated a no response when asked if he ever felt that he did not want to continue living.

We do not believe that the testimony and affidavit of Mary Martin, Mr. Martin's wife and guardian, constitute clear and convincing evidence of Mr. Martin's preinjury statement of his desire to refuse life-sustaining medical treatment under these specific circumstances. We are not satisfied that the evidence is "so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Cruzan*, 497 US 285, n 11. Thus, the clear and convincing evidence standard has not been satisfied.[23]

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[23] The dissent argues that an appellate court may only reverse trial court findings of fact if they are clearly erroneous. The majority is accused of disrespecting the trial court's role as factfinder and engaging in a de novo review of the facts. Nothing could be further from the truth. The majority's careful review of the entire record created below did not involve a search for new facts as the dissent suggests. Instead, it was a search designed to answer a singularly important question of law: Do the facts presented below provide a sufficient evidentiary basis for the trial court's determination that the rigorous demands of the clear and convincing standard were met? The majority's respect for the careful work of our colleagues below will not excuse an abdication of responsibility.

In the absence of clear and convincing evidence of Mr. Martin's preinjury statement expressing his decision to refuse life-sustaining medical treatment under the present circumstances, we will not authorize the removal of life-sustaining medical treatment. Our determination is consistent with the furtherance of this state's interest in preserving the sanctity of life and does not abridge Mr. Martin's right to refuse life-sustaining medical treatment.

Conclusion

We hold that, once it is determined that the individual is conscious and was competent at some time before his present injuries were sustained, a surrogate decisionmaker cannot make a decision for or in place of a conscious incapacitated individual regarding his decision to waive the right to continue life-sustaining medical treatment. However, where the surrogate decisionmaker can establish by clear and convincing evidence that the conscious incapacitated individual, while competent, made a statement of his desire to refuse life-sustaining medical treatment under these circumstances, then the surrogate must be allowed to effectuate the incapacitated individual's expressed preference. In the absence of clear and convincing evidence of the conscious incapacitated individual's preinjury statement expressing his decision to refuse life-sustaining medical treatment under the present circumstances, courts will not authorize the removal of life-sustaining medical treatment.

Accordingly, we reverse the Court of Appeals determination because petitioner's testimony and affidavit do not constitute clear and convincing evidence of Mr. Martin's preinjury decision to decline life-sustaining medical treatment in the form of a gastrostomy tube that provides hydration and nutritive support.

We do not retain jurisdiction.

Conrad L. Mallett, Jr.
James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Elizabeth A. Weaver

LEVIN, J. (*dissenting*).

Two issues are presented. The first is whether the trial court clearly erred in finding by clear and convincing evidence that before his injuries, Michael Martin expressed a medical "preference to decline life-sustaining medical treatment under the circumstances presented." [1]

The second asks what showing, if any, justifies the withdrawal of life-sustaining medical treatment in the absence of clear and convincing evidence of such preinjury wishes.

I dissent from the majority's holdings on both issues. On the second issue, I do not agree with the majority that, on the facts of this case, life-sustaining medical treatment can only be removed with clear and convincing evidence of the patient's expressed preinjury wishes. I would not reach the question what showing, other than clear and convincing evidence, would justify withdrawal of life-sustaining medical treatment, because the trial court did not clearly err in finding that clear and convincing evidence was presented that Michael Martin, before his injury, did not want to be kept alive in his current condition.

I

The Court of Appeals began by noting that a competent adult has a right to refuse life-sustaining medical treatment, and that an incompetent patient, while not losing this right, must have it exercised by a surrogate decisionmaker.[2] The Court explained that if a patient has the capacity to decide whether to accept life-sustaining medical treatment, it is his decision to make. Before the choice can be made by anyone other than the patient, there must be clear and convincing evidence that the

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[1] *In re Martin (After Remand)*, 205 Mich App 96, 99; 517 NW2d 749 (1994) (*Martin II*).

[2] *In re Martin*, 200 Mich App 703, 713; 504 NW2d 917 (1993) (*Martin I*).

patient lacks this capacity and will not regain it in the future. If such evidence is shown, a decisionmaker should then ask whether there is clear and convincing evidence of the patient's previously expressed desires regarding life support under the conditions in which the court finds the patient to be. If so, those desires must be effectuated.[3] This is a purely subjective inquiry into the patient's prior wishes.[4]

Up to this point, the majority and the Court of Appeals would apply a similar analysis.[5] The majority does not dispute the trial and appellate courts' conclusion that Michael Martin permanently lacks the capacity to exercise his right to have life-sustaining medical treatment removed.[6] The majority disagrees with the finding that clear and convincing evidence has been presented of Michael Martin's preinjury wishes.[7]

II

In ruling that clear and convincing evidence has not been presented, the majority becomes the first disinterested body to examine Michael Martin's case without being convinced by the ample evidence of his prior wishes.

The bioethics committee of the hospital caring for Michael concluded that the request to remove life-

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[3] *Id.*, p 713.

[4] Meisel, The Right to Die, § 9.10, p 270.

[5] As the majority notes, the requirement of clear and convincing evidence is not an entirely different standard. It is simply the burden of proof for the exercise of the substantive inquiries. Meisel, n 4 *supra*, § 8.38, p 230 (1994 cumm supp). Some authorities, however, have used it as shorthand for a court's refusal to allow removal of life-sustaining medical treatment absent clear and convincing evidence of a patient's prior wishes. See, e.g., Beebe, *The right to die: Who really makes the decision?* 96 Dick L R 649 (1992).

[6] Slip op, p 11, n 10.

[7] *Id.*, p 2.

sustaining medical treatment "was in accord with Mr. Martin's wishes as expressed . . . prior to his injury." The court-appointed guardian ad litem—whose role is to represent Michael's best interests—also recommended the withdrawal of life support. The trial court and Court of Appeals agreed that Michael "clearly and convincingly reveal[ed] his expressed preference to decline under the circumstances presented." [8]

Evidence is "clear and convincing" when it

> "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the fact-finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." [9]

The probative value of a once-competent patient's past statements about life-sustaining medical treatment varies, "depending on the[ir] remoteness, consistency, and thoughtfulness," as well as their specificity and the maturity of the person making the statement.[10]

An appellate court may only reverse a trial court's findings of fact if they are clearly erroneous.[11] Instead of respecting the trial court's role as factfinder, the majority has engaged in a de novo review of the facts. It ignores the admonition that in cases like this an appellate court "must also be cognizant of the profound responsibility which has been vested in the trial court and should not substitute its judgment for that of a trial court." [12]

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[8] *Martin II*, n 1 *supra*, p 105.

[9] *In re Jobes*, 108 NJ 394, 407; 529 A2d 434 (1987); (quoting *State* v *Hodge*, 95 NJ 369, 376; 471 A2d 389 [1984]).

[10] *In re Conroy*, 98 NJ 321, 362; 486 A2d 1209 (1985).

[11] *In re Cornet*, 422 Mich 274, 277-278; 373 NY2d 536 (1985).

[12] *In re Fiori*, 438 Pa Super 610, 637; 652 A2d 1350 (1995).

The evidence adduced at trial demonstrated Michael's deeply felt, consistent, and long-term desire not to be maintained artificially in a helpless condition. Michael's sister Patricia Major—one of the appellants seeking to keep him alive—testified that even as a teenager Michael told her seriously that he did not want to be maintained on a respirator while unconscious. He later told friends and co-workers that "if he ever was in a [sic] accident & was in a vegetable [sic] state, he hoped someone pulled the plug."

The majority dismisses these statements because they referred to a persistent vegetative state, rather than Michael's current condition.[13] But the bioethics committee concluded that

> the persistence of [Mr. Martin's] condition and the level of functioning were equivalent to a persistent vegetative state for purposes of considering the removal of nutrition support . . . .

While not vegetative, Michael has minimal cognition and essentially no ability to communicate. Additionally, as one physician testified, when lay persons express a desire not to be a "vegetable," they usually are not referring strictly to a persistent vegetative state. Rather, the popular understanding involves a "spectrum of things, but the commonality of that is, independence of life . . . things in terms of basic needs of human body,—bathing, eating and able to void."

Moreover, Michael did not refer only to life as a "vegetable." These statements must be viewed in combination with the testimony of Mary Martin. Mary testified about a series of conversations with Michael over a period of years, in which he expressed his desire not to be kept alive artificially if "he had to be dependent on people and machines . . . ." She testified that his concern was not with being unconscious, but with being dependent on others for the most basic bodily functions.

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[13] Slip op, p 24.

As the Court of Appeals stated:

> Prevalent throughout Michael's statements is the preference not to be maintained in a condition where he was incapable of performing basic functions such as walking, talking, dressing, bathing, or eating, and, instead, was dependent upon others or machines for his basic needs. This is exactly the condition in which Michael now finds himself.[14]

The conversations between Michael and Mary were not merely idle talk or emotional reactions to watching other persons suffer.[15] Mary testified that the last conversation occurred as she was awaiting surgery for internal hemorrhaging. Michael and Mary each promised not to leave the other dependent on artificial life support, should such a tragedy occur. Mary's affidavit reported that Michael told her on one occasion that if she left him dependent on machines, "I'll always haunt you, Mary."

Not even the two appellants seeking to keep Michael alive offer any basis for questioning the veracity of this testimony. Michael's sister, Patricia Major, conceded she had no reason to doubt that these conversations had occurred.[16] His mother, Leeta Martin, also testified that before the accident, Michael "would not have wanted to be helpless and dependent on others." [17]

Other courts have found clear and convincing evidence of prior expressed wishes from similar or less compelling testimony than that in this case. See, e.g., *In re Swan*, 569 A2d 1202, 1205 (Me, 1990), affirming a finding

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[14] *Martin II*, n 1 *supra*, pp 103-104.

[15] Silp op, pp 25-26.

[16] *Id.*, p 26.

[17] Leeta Martin argued that, if the court found Michael lacked the capacity to decide his own fate, his prior wishes should not control because "when the good Lord wants him, the good Lord will take him."

of clear and convincing evidence of a prior expressed decision where a seventeen-year-old patient, after seeing or hearing of others receiving life-sustaining medical treatment, had twice expressed orally a desire not to be maintained artificially, *Elbaum by Elbaum* v *Grace Plaza of Great Neck*, 148 AD2d 244, 249-254; 544 NYS2d 840 (1989), ruling that oral statements to family members made over a period of years, most of which were in response to observing others receiving life-sustaining medical treatment, constituted clear and convincing evidence of the patient's prior wishes.[18]

The majority insists that a person's wishes are not clearly known unless the applicable medical conditions are accurately specified.[19] In effect, this requirement will force most persons to seek legal assistance to assure that their wishes will be effectuated. By referring to being "dependent" or a "vegetable," Michael was

> "express[ing] [his] wishes in the only terms familiar to [him], and . . . as clearly as a lay person should be asked to express them. To require more is unrealistic, and for all practical purposes, it precludes the right of patients to forego life-sustaining treatment.[20]

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[18] See also *In re Browning*, 568 So 2d 4, 17 (Fla, 1990). Browning had executed a written declaration proving that life-sustaining medical treatment should be withheld if she were terminally, irreversibly ill and her death were imminent. A stroke left her in a condition similar to Michael Martin's in which she was dependent on artificial nutrition. Despite her ability to live indefinitely on the feeding tube, the court permitted withdrawal of life-sustaining medical treatment under the dictates of her directive.

[19] Slip op, p 24, requiring that the prior statements describe "these exact circumstances, or circumstances highly similar" to the patient's current condition.

[20] *Cruzan* v *Director, Missouri Dep't of Health*, 497 US 261, 324; 110 S Ct 2841; 111 L Ed 2d 224 (1990) (Brennan, J, dissenting), quoting *In re O'Connor*, 72 NY2d 517, 551; 531 NE2d 607 (1988) (Simons, J., dissenting).

The majority also states that "[s]tatements made in response to seeing or hearing about another's prolonged death do not fulfill the clear and convincing standard." [21] This bright-line rule ignores that many persons only consider their own mortality seriously upon hearing about the end of other people's lives. Admittedly, the emotional content of such statements must be carefully considered in weighing their probative value. But the majority's "categorical exclusion of [this] relevant evidence dispenses with any semblance of accurate factfinding." [22]

The majority's treatment of the evidence in this case suggests that it would require a highly formal oral or written statement concerning the patient's specific medical condition. To impose such rules would be unrealistic.[23]

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[21] Slip op, p 23.

[22] *Cruzan*, n 20 *supra*, p 321 (Brennan, J, dissenting), criticizing the Missouri court's refusal to consider such evidence. See also *Conroy*, n 10 *supra*, p 361, noting that prior statements of intent "might take the form of reactions that the patient voiced regarding medical treatment administered to others."

[23] For various reasons, most persons neglect to formalize their wishes this way, even though they may feel strongly about them. *Cruzan*, n 20 *supra*, pp 323-324.

Appellants also argue that even if clear and convincing evidence exists of Michael's preaccident wishes not to continue life-sustaining medical treatment in this situation, he has since changed his mind. They claim that he has shown "a present desire to accept treatment . . . ." The majority does not reject this contention. Slip op, p 11, n 10. The evidence, however, demonstrates that Michael lacks the ability to understand or express a decision about ending his life.

The majority does not question the trial court's ruling that "Michael does not have, nor will he regain, sufficient decision-making capacity with respect to a decision to withdraw life-sustaining medical treatment." *Martin II*, n 1 *supra*, p 100. Several physicians testified at trial that Michael has only a very limited comprehension of his condition. Doctors testified that he lacks the capacity to "understand[] the treatment choices, []or the consequences of those." One physician opined that Michael could comprehend a

III

Petitioner presented clear and convincing evidence of her husband's prior wishes. As a result, I would not decide in this case whether the search for clear and convincing evidence of a patient's previously expressed wishes needs to be followed by another subjective inquiry, an objective inquiry, or some amalgam of the two.

Although the trial court found that clear and convincing evidence had been presented, the Court of Appeals outlined additional steps for a decisionmaker to take when such evidence is lacking. It stated that in such a case, the decisionmaker should next apply a "substituted judgment" standard. This would require some trustworthy evidence of the patient's preinjury wishes, even if less than clear and convincing evidence. In addition, if this evidence suggests the patient would want treatment withdrawn under the conditions that exist, the court must also decide that the burdens of prolonged life outweigh its benefits before allowing withdrawal.[24]

Finally, if there is no evidence at all of the patient's prior wishes, the Court of Appeals stated that a pure best interests standard should be applied. This is also referred to as an "objective" test, because it seeks to

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question phrased in terms of "does he want to live or die?" Another doctor disagreed, however.

Michael lacks the ability to communicate. The guardian ad litem testified that Michael "is unable to communicate on any meaningful level." Appellants point to Michael's head nods and constant smile as evidence of his desire to live. But the head nods given "in response" to questions are far too inconsistent to allow him to communicate with any effectiveness.

In light of Michael's inability to express or even understand such a choice, appellants' claim that he has changed his mind about life-sustaining medical treatment seems overly optimistic at best. Their well-intentioned hopes should not be allowed to override the wishes he clearly expressed while competent.

[24] *Martin I*, n 2 *supra*, p 712.

determine a patient's objective best interests rather than his subjective wishes.[25] The Court of Appeals explained:

> The logic of this sequential analysis is rooted in the fact that, as we progress from one step to the next, we are moving away from deferring to the wishes of the patient to the point where we allow others (fiduciaries, family members, ethics committees, and courts) to decide whether the patient will live or die without reference to the patient's wishes. Our premise is that this should not be permitted except as a last resort, given society's reverence for life and its acknowledgement that patients have an inherent right of self-determination. Nevertheless, we may not eliminate [the pure best interests approach] because to do so would be to hold that where the patient is incompetent, never expressed a preference, and the court cannot determine what the patient would do under existing circumstances, life support may never be withdrawn. That is not the current state of the law.[26]

This approach originated with the New Jersey Supreme Court decision in *In re Conroy*,[27] and has been praised by commentators.[28]

IV

The majority would make Michigan one of a small minority of states to forbid termination of life support unless clear and convincing evidence is presented that the patient has expressly stated his wishes that it be removed under the specific conditions applicable.[29] Courts have

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[25] Meisel, n 4 *supra*, § 9.16, p 278.

[26] *Martin I*, n 2 *supra*, p 713.

[27] *Conroy*, n 10 *supra*, pp 361-366.

[28] Meisel, n 4 *supra*, § 9.10, p 269.

[29] Only New York and Missouri courts have imposed such a rigid standard. *O'Connor*, n 20 *supra*, pp 530-531; *Cruzan, by Cruzan* v

attached differing meanings to terms such as "clear and convincing" [30] or "substituted judgment." [31] But most courts to address this issue have permitted termination of life-sustaining medical treatment on the basis of an objective test, or at least a more lenient subjective standard than the one required by the majority.[32] These cases

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Harmon, 760 SW2d 408, 425 (Mo, 1988), aff'd, *Cruzan v Director*, n 20 *supra*. See also *DeGrella by and through Parrent v Elston*, stating:

> In all but two states, Missouri and New York, even when the court has been unable to precisely determine the express wishes of the patient, it has allowed the patient's family, or the patient's guardian, to exercise substituted judgment as to what the patient would wish. [858 SW2d 698, 706 (Ky, 1993).]

[30] See n 5 *supra*.

[31] The majority describes the "substituted judgment" standard as "entail[ing] some level of objective analysis" because it allows the decisionmaker to consider a broad range of factors, including the patient's personal values and other behavior, to determine what the patient "would choose." Slip op, pp 14-15.

Some courts appear to have allowed the decisionmaker actually to substitute his own judgment for the wishes of the incompetent patient. See, e.g., *In re Torres*, 357 NW2d 332, 341 (Minn, 1984). But properly applied, the substituted judgment standard closely resembles a subjective inquiry with a burden of proof lower than "clear and convincing evidence." It "attempt[s] to replicate what the patient would have decided if competent to do so." Meisel, n 4 *supra*, § 9.10, p 270.

[32] Most courts have ruled that even where a patient has not expressly stated wishes regarding life-sustaining medical treatment, a substituted judgment standard is used to determine "what decision the patient would make if he were competent to do so." *In re Longeway Estate*, 133 Ill 2d 33, 49; 549 NE2d 292 (1989). See also *Guardianship of Doe*, 411 Mass 512, 517-518; 583 NE2d 1263 (1992); *Browning*, n 18 *supra*, p 13. A smaller number of courts have employed a pure objective "best interests" standard. See, e.g., *Conroy*, n 10 *supra*; *Rasmussen by Mitchell* v *Fleming*, 154 Ariz 207, 221-222; 741 P2d 674 (1987).

typically seek to respect the patient's wishes whenever they can be determined without "foreclos[ing] the possibility of humane actions, which may involve termination of life-sustaining treatment, for persons who never clearly expressed their desires about life-sustaining treatment . . . ." [33]

A

The majority first chooses to apply only a purely subjective inquiry in this case. It notes that "the evidentiary and decisionmaking standards appropriate in a given case do not depend on the source of the right;" [34] yet its analysis rests on its choice of informed consent as the sole basis for the right to refuse life-sustaining medical treatment in this case. The majority rightly points out that the substituted judgment standard, and especially the best interests standard, "entail[] some level of objective analysis." [35] But this has not constrained other courts to look solely at the patient's prior expressed wishes. Instead, courts have employed their parens patriae authority to allow surrogate decisionmaking with both objective and subjective inquiries.[36]

But with little discussion, the majority declines to make use of its parens patriae power.[37] The majority claims that cases adopting an approach with objective elements have generally involved patients in circumstances differ-

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[33] *Conroy*, n 10 *supra*, p 346.

[34] Slip op, pp 9-10. See also *Meisel*, n 4 *supra*, § 3.4, p 50.

[35] *Id.*, p 14.

[36] See, e.g., *Longeway*, n 32 *supra*, pp 52-53; *Conroy*, n 10 *supra*, p 364.

[37] It states simply that "we find nothing that prevents the state from grounding any objective analysis on a threshold requirement of pain, terminal illness, foreseeable death, a persistent vegetative state, or affliction of a similar genre." Slip op, p 17.

ent than Michael Martin.[38] The majority offers no convincing explanation of why Michael Martin's condition must be treated differently.[39]

Implicit in the majority's refusal to inquire into those benefits and burdens seems to be a judgment that the costs of not making that inquiry are less than for patients in other circumstances. The majority seems to assume that life in Michael Martin's situation is somehow more tolerable for him. This suspicion is heightened by the majority's suggestion that an objective inquiry into Michael Martin's best interests would support maintaining him on life-sustaining medical treatment.[40] This conclusion, however, is flatly contradicted by the court-appointed guardian ad litem, who concluded that removing life-sustaining medical treatment would be in Michael's best interests.

B

After limiting the inquiry to the patient's prior expressed wishes, the majority compounds its error by imposing a heightened standard of proof. The majority recognizes the principle that "a decision to refuse medical treatment in future situations, made while competent, is not lost because of incompetency or the inability to com-

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[38] *Id.* The majority, however, fails to cite any factually similar cases in which courts have *refused* to go beyond the subjective inquiry. In *Browning*, n 18 *supra*, p 13, the Florida Supreme Court espoused a substituted judgment standard where the patient was in a condition similar to Michael Martin's and had executed a prior directive that only arguably addressed her current condition.

[39] For example, the majority notes that courts have used objective inquiries where a patient was never competent. Slip op, p 17. But as one commentator notes, "decisionmaking for never-competent patients is merely a variant of the larger problem of decisionmaking for patients whose preferences are unknown and unknowable." Meisel, n 4 *supra*, § 9.14, p 275.

[40] Slip op, p 18, n 16.

municate." [41] Yet its "clear and convincing" burden of proof will have that effect in many cases, including this one.[42]

As one court has recently noted, the patient's "right to self determination would not be protected, but rather, might well be negated" if life-sustaining medical treatment withdrawal were forbidden absent clear and convincing evidence of a patient's prior expressed wishes addressed to the current condition.[43] Under the majority's approach, courts inevitably will reject trustworthy evidence concerning a patient's prior wishes on the ground that it fails to meet the clear and convincing evidence standard. As one commentator stated, "those few states that require a 'clear and convincing' standard of evidence will likely fail to honor an incompetent patient's desires." [44]

V

The majority characterizes its ruling as a cautious approach to a life-or-death decision.[45] It suggests that "an erroneous decision not to terminate [life-sustaining medical treatment] results in a maintenance of the status quo" and that such an error can be corrected in the future.[46] But keeping Michael Martin alive is not the neutral, safe solution. As Justice Brennan stated in *Cruzan*,

> from the point of view of the patient, an erroneous decision in either direction is irrevocable. An errone-

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[41] Slip op, p 11.

[42] The majority tries to limit its ruling to the facts of this emotionally difficult case. See, e.g., *id.*, p 18, n 15. But trial courts and Court of Appeals will follow this Court's lead in other cases involving very different facts.

[43] *Fiori*, n 12 *supra*, p 623.

[44] See Beebe, n 5 *supra*, p 665.

[45] Slip op, pp 19-20.

[46] *Id.*, p 21.

> ous decision to terminate artificial nutrition and hydration, to be sure, will lead to . . . complete brain death. An erroneous decision not to terminate life support, however, robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. His own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted.[47]

The majority's tightly constricted inquiry greatly increases this risk. In this case, it has sentenced Michael Martin to life in a helpless, degraded condition against his prior wishes. To quote the majority's own opinion, "to condemn persons to lives from which they cry out for release is nothing short of barbaric." [48]

Charles L. Levin

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[47] *Cruzan* v. *Director*, n 20 *supra*, p 320 (Brennan, J, dissenting).

[48] Slip op, p 2.

APPENDIX B

May 2, 1994

STATE OF MICHIGAN
COURT OF APPEALS

IN RE MICHAEL MARTIN,
a legally incapacitated person.

No. 161299
LC No. 87044115
After Remand

MARY MARTIN, Guardian and Conservator of
MICHAEL MARTIN, a legally incapacitated person,
Petitioner-Counter
Respondent-Appellant,

v.

LEETA M. MARTIN and PATRICIA MAJOR,
Respondents-Counter
Petitioners-Appellees.

No. 161431
LC No. 87044115
After Remand

MARY MARTIN, Guardian and Conservator of
MICHAEL MARTIN, a legally incapacitated person,
Petitioner-Counter
Respondent-Appellee,

v.

LEETA M. MARTIN and PATRICIA MAJOR,
Respondents-Counter
Petitioners-Appellants.

Before: Wahls, P.J., and Shepherd and Cavanagh, JJ.

SHEPHERD, J.

These consolidated appeals are before this Court for the second time after having been remanded to the Allegan County Probate Court for further proceedings on a variety of matters in connection with both petitioner Mary Martin's petition for authority to withdraw her husband Michael Martin's life support and the counter-petition of respondents Patricia Major and Leeta Martin, who are Michael's sister and mother respectively, to remove Mary Martin as Michael's guardian. See *In re Martin*, 200 Mich App 703; 504 NW2d 917 (1993). On October 18, 1993, following several days of further testimony, the trial court issued an order adjudicating the following (1) that Michael does not have, nor will he regain, the requisite capacity to make a decision regarding the withholding or withdrawal of life-sustaining medical treatment, (2) that clear and convincing evidence exists demonstrating Michael's previously expressed preference to decline life-sustaining medical treatment under the circumstances presented, (3) that petitioner is a suitable person to represent Michael with respect to a decision to withdraw life-sustaining medical treatment, and (4) that attorney fees incurred by respondents in excess of $20,000 may not be charged against Michael's estate. Respondents now appeal each of these rulings.

As we noted in our original opinion, Michael Martin sustained debilitating injuries in an automobile accident in 1987, with the most serious being a closed head injury resulting in severe subcortical brain damage significantly impairing both his physical and cognitive functioning. Michael's injuries left him totally paralyzed on his left side but with some limited, though mainly nonfunctional, movement of his right limbs. He cannot eat, walk, or talk, and he has no bladder or bowel control. He is dependent on a feeding tube for nutrition and a colostomy

for defecation. Although, as noted above, his cognitive abilities were also seriously affected, Michael remains conscious, he has some awareness of his surroundings, and he can communicate to some extent through head nods.

I.

In view of the evidence disclosing that Michael has some ability to interact and communicate, we directed the trial court to determine, on remand, whether Michael possesses the requisite decision-making capacity to make a decision regarding the withholding or withdrawal of life-sustaining medical treatment, pursuant to the following four-part test:

> The test for determining if a person has the requisite capacity to make a decision concerning the withholding or withdrawal of life-sustaining medical treatment is whether the person (1) has sufficient mind to reasonably understand the condition, (2) is capable of understanding the nature and effect of the treatment choices, (3) is aware of the consequences associated with those choices, and (4) is able to make an informed choice that is voluntary and not coerced. . . . The proof must be clear and convincing that the patient does not have and will not regain the capacity of making the decision. [*In re Martin, supra* at 715-716.]

On remand, after hearing extensive additional medical testimony concerning Michael's condition and level of functioning, the trial court found that the evidence was clear and convincing that Michael does not have, nor will he regain, sufficient decision-making capacity with respect to a decision to withdraw life-sustaining medical treatment.

The trial court's findings of fact are subject to review under the clearly erroneous standard. *In re Martin, supra* at 715. A finding is clearly erroneous when, although

there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *In re Cornet*, 422 Mich 274, 277-278; 373 NW2d 536 (1985).

Here, several medical experts testified at the remand proceedings concerning Michael's cognitive abilities. According to Dr. William Vandenberg, a physical medicine and rehabilitation specialist who works extensively with head injured patients, Michael can understand only very short and very simple questions and cannot accurately comprehend questions which are lengthy, verbose or which require the retention of multiple thoughts. Similar testimony was provided by Dr. Donald Rutherford, who is the Medical Director at the Glenwood Christian Nursing Home where Michael resides. Dr. Robert Kreitsch, who was one of respondents' main experts, likewise described Michael's levels of cognition and comprehension as being limited to "very, very simple terms" and "some simple short phrases." According to Dr. Kreitsch, given Michael's memory deficiencies and inability to retain information, Michael is incapable of processing the necessary information to fully understand his condition. Drs. Vandenberg, Rutherford, and Kreitsch uniformly agreed that Michael does not possess the requisite capacity to satisfy the four-part test for evaluating decision-making capacity.

This same conclusion was also reached by Dr. Ronald Cranford, a neurologist, whose testimony was accorded significant weight by the trial court. Dr. Cranford provided detailed testimony describing not only Michael's condition and level of functioning from a medical standpoint, but also the process involved in assessing Michael's cognitive capabilities during a recent evaluation. Dr. Cranford's evaluation demonstrated that, consistent with the testimony of the other medical experts, Michael possesses an ability to understand some simple questions concerning basic and familiar items, although even then his responses are not always consistent, but that he lacks

an understanding of more complex items, including his physical capabilities and medical condition.

Although one of respondents' experts, Dr. Walter Zetusky, a neuropsychologist, testified that he evaluated Michael in 1990 and determined that he had an IQ of 63, thus placing him at a higher level of cognitive functioning than that described by the other medical experts, the trial court accorded little probative value to the IQ testing. Significantly, the trial court noted that other medical experts questioned the validity of any IQ testing of Michael, and further, that another expert, Dr. David Winstrom, in fact attempted to perform similar testing on Michael in April 1993, but was unable to do so, given Michael's inability to respond at a sufficient level to permit testing. More importantly, the trial court observed that not even Dr. Zetusky was able to provide unqualified testimony indicating that Michael has sufficient capacity to satisfy the four-part test for evaluating decision-making capacity.

Finally, it was the general consensus among the medical experts that Michael's condition and cognitive level of functioning will not improve in the future.

In view of the foregoing evidence, we find that the trial court did not clearly err in finding that Michael does not have and will not regain the requisite decision-making capacity to make a decision concerning the withholding or withdrawal of life-sustaining medical treatment.

II.

The next issue before us involves the matter of Michael's previously expressed medical preferences.

In our earlier decision, we stated:

> [W]here a formerly competent patient lacks the requisite capacity to make a decision regarding the withholding or withdrawal of life-sustaining medical treatment, such treatment may be withheld or with-

> drawn upon proof by clear and convincing evidence of the patient's previously expressed medical preference to decline treatment under the circumstances presented. [*In re Martin, supra* at 711.]

We directed the trial court to provide, on remand, new findings of fact and conclusions of law in connection with the issue of Michael's previously expressed medical preferences, given the inadequacy of the trial court's original findings on this issue and our conclusion that the trial court had erred in holding that a person's medical preferences could not be considered unless they were expressed in writing. *In re Martin, supra* at 713-714, 717-718. Respondents now challenge the trial court's determination, on remand, that clear and convincing evidence had been presented demonstrating Michael's previously expressed preference to decline life-sustaining medical treatment under the circumstances presented.

Testimony was received from respondent Major as well as two of Michael's former co-workers describing statements made by Michael before his accident wherein he expressed a preference not to be maintained in a coma or in a vegetative state. The trial court found, and we agree, that Michael's present circumstances do not conform to those described by Michael when making those prior statements. However, testimony was also received from petitioner, who described numerous statements that were made to her by Michael before his accident, on different occasions and in different settings and contexts, all expressing a preference not to be maintained under various described circumstances. According to petitioner, Michael was adamant and made it very clear that he did not want to be kept alive in the circumstances described. The trial court found that the statements were sufficient in detail to establish Michael's previously expressed preference to decline life-sustaining medical treatment under the present circumstances. We agree.

Prevalent throughout Michael's statements is the preference not to be maintained in a condition where he was incapable of performing basic functions such as walking, talking, dressing, bathing, or eating, and instead was dependent upon others or machines for his basic needs. This is exactly the condition in which Michael now finds himself. The evidence clearly and convincingly establishes that Michael suffers from severe brain damage and cannot eat, walk, talk, bathe or dress himself, nor can he control his bladder or bowels. Moreover, he is permanently paralyzed on his left side and has only very limited movement of his right side. As noted previously, his cognitive functioning is severely impaired, with his ability to understand and comprehend spoken language limited to a very simple and basic level. As a result of his physical and cognitive limitations, Michael is totally dependent upon others for all of his basic needs.

Michael's discussions also reveal an express preference not to be maintained by machines in order to be kept alive. Presently, Michael requires a feeding tube inserted through his stomach as his source of nutrition and hydration and a colostomy to remove his waste. Although Michael did not refer specifically to these procedures in his prior statements, he did specifically describe circumstances in which he was unable to feed himself or in which he was required to wear diapers to continue living, both of which are applicable to his present situation.

One of the limitations expressed by Michael in his pre-accident discussions was that there be no hope of getting better or improving. Here, the evidence is clear and convincing that Michael's brain damage is permanent and that his present condition will not improve.

Also, Michael's statements are not limited to the expression of a mere preference not to live in the circumstances described; rather, they specifically contain stated preferences not to be maintained and not to be kept alive

under such circumstances. Moreover, the fact that Michael's preferences were expressed repeatedly, adamantly, and in different contexts, together with the evidence showing that he had similar discussions with others, indicate that Michael was firm and settled in his desire to have life-sustaining medical treatment withheld or withdrawn in the circumstances described.

For the foregoing reasons, we agree that Michael's present situation conforms to the circumstances contemplated by him in his pre-accident discussions with petitioner, and that the discussions clearly and convincingly reveal his expressed preference to decline life-sustaining medical treatment under the circumstances presented.

Nevertheless, respondents assert that petitioner lacked credibility as a witness and, therefore, the trial court erred in according weight to her testimony. In applying the clearly erroneous standard, "regard is to be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). In this case, the trial court specifically addressed the issue of credibility in its findings and found that petitioner was "credible, if not the most credible witness the court has heard throughout these proceedings." After thoroughly examining the record, we find no basis upon which to disagree with the trial court's assessment of credibility. Indeed, we observe that even respondent Major testified that she had no reason to believe that Michael didn't have the discussions described by petitioner.

Accordingly, we find that the trial court did not clearly err in finding that Michael had previously expressed a medical preference to decline life-sustaining medical treatment under the circumstances presented.

III.

The next issue before us concerns the matter of respondents' petition to remove Mary Martin as Michael's representative and guardian. In our original decision, we stated that the trial court had erred when it denied respondents' petition for removal of Mary Martin as Michael's guardian without having held a hearing for the purpose of inquiring into her suitability to represent Michael. *In re Martin, supra* at 718-719. We also found that the trial court had erred in summarily excluding evidence concerning issues of possible bias, prejudice, conflict of interest, or improper motive on the part of petitioner. *Id.* On remand, after hearing evidence concerning petitioner's performance and suitability as guardian, as well as evidence tending to show the existence of possible bias, prejudice, conflict of interest, or improper motive on petitioner's part, the trial court found that petitioner has been and continued to be a suitable person to act as Michael's guardian and to represent him with respect to a decision to withdraw life-sustaining medical treatment.[1] We agree.

First, we observe that Drs. Rutherford, Vandenberg, and Cranford all testified that Michael has received an appropriate course of medical care and treatment. We also observe that several physicians and other medical personnel, as well as an insurance claims specialist who has dealt with petitioner frequently over the years, testified that petitioner has always appeared interested and supportive of Michael's care and has tried to see to it that he

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[1] In our earlier decision we stated that any "properly preserved" request for a jury determination of factual disputes in connection with respondents' petition for removal was to be resolved in accordance with MCL 600.857(1); MSA 27A.857(1). *In re Martin, supra* at 719-720. On remand, the trial court denied respondents' request for a jury determination of disputed factual issues, finding that their request had not been "properly preserved" under MCR 5.508. Respondents have not challenged this ruling.

receives the best possible care. Although respondents are critical of petitioner's failure to provide recreational threapy, Dr. Cranford testified that such therapy would not be of any benefit to Michael, given his reduced level of functioning. Other medical personnel likewise questioned the benefit of such therapy.

We reject respondents' contention that petitioner is not a suitable person to represent Michael because of factors such as financial considerations or her relationships with others. These matters were fully explored during the proceedings on remand and the trial court found no evidence indicating that petitioner either has been improperly influenced or that her performance as guardian has otherwise been compromised by such factors. Again, we find no basis in the record upon which to disagree with this finding.

Respondents also argue that a number of isolated incidents reveal that petitioner has not always acted with Michael's best interests in mind. However, the trial court found that petitioner had not acted improperly, and, in any event, that the incidents complained of were nothing more than "smoke screens" occasioned by respondents' disagreement with petitioner over the issue of withdrawal of life support. Having reviewed the record, we cannot say that the trial court erred in these findings. Indeed, we observe that respondent Martin admitted she would not be seeking to remove petitioner as Michael's guardian if it were not for the petition to withdraw life-sustaining medical treatment, and that respondent Major likewise testified that her "main complaint" with petitioner was the fact that she had filed a petition to withdraw Michael's life support.

Accordingly, we find no error in the trial court's decision both denying respondents' petition to remove petitioner as Michael's guardian and holding that petitioner is a suitable person to represent Michael with respect to a decision to withdraw life-sustaining medical treatment.

IV.

Finally, respondents argue that the trial court abused its discretion in denying their request for attorney fees in excess of $20,000. We agree.

In the original appeal in this matter, the question was raised whether reasonable attorney fees incurred by respondents could be charged against Michael's estate. Citing *Becht* v *Miller*, 279 Mich 629, 638; 273 NW 294 (1937), and *In re Valentino Estate*, 128 Mich App 87, 96; 339 NW2d 698 (1983), we observed that attorney fees incurred by a nonfiduciary in a probate court proceeding may be charged against the estate of a ward where the ward's estate is benefitted and that such a rule was applicable in the case at hand. *In re Martin, supra* at 722. Accordingly, we held that reasonable attorney fees incurred by respondents could be charged against Michael's estate and we remanded for a hearing with regard to the question of reasonableness. *Id.* at 722-723.

On remand, respondents submitted an itemized statement of attorney services reflecting actual attorney fees incurred in the amount of $135,192.17. Respondents requested that they be awarded this amount from Michael's estate, less $20,000 which had already been paid pursuant to an earlier agreement.[2] However, the trial court denied respondents' request for additional attorney fees altogether, reasoning that their participation in the proceedings failed to produce any "additional benefit to the estate."

A probate court has broad discretion in determining what amount constitutes reasonable compensation for attorney services. *In re Krueger Estate*, 176 Mich App

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[2] As we explained in our original decision, petitioner had previously agreed to pay attorney fees incurred by respondents up to $20,000. The issue in dispute was whether respondents were entitled to recover an additional amount. *In re Martin, supra* at 721.

241, 248; 438 NW2d 898 (1989). In making this determination, the court should adhere to the guidelines for determining "reasonableness" set forth in *Crawley* v *Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). See *In re L'Esperance Estate*, 131 Mich App 496, 501; 346 NW2d 578 (1984). The Court in *Crawley* stated:

> There is no precise formula for computing the reasonableness of an attorney's fee. However, among the facts to be taken into consideration in determining the reasonableness of a fee include, but are not limited to, the following: (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.

Although the actual amount of attorney fees requested may be considered, it is not controlling in itself and an award of reasonable attorney fees is not confined to that amount. *In re Bender's Estate*, 246 Mich 405, 408; 224 NW 381 (1929); *In re O'Neill Estate*, 168 Mich App 540, 542-543; 425 NW2d 133 (1988). See also *Petterman* v *Haverhill Farms, Inc.*, 125 Mich App 30, 33; 335 NW2d 710 (1983). The burden of proof on the question of reasonableness rests on the party claiming a right to compensation. *In re Krueger Estate, supra* at 249.

In this case, we find that the trial court abused its discretion in denying respondents' request for additional attorney fees. In reaching its decision, the trial court failed to consider the various reasonableness factors and also declined to hear petitioner's specific objections to the reasonableness of respondents' requested attorney fees. Instead, the trial court decided that respondents were not entitled to attorney fees in the first instance. However, we

had already ruled that respondents were entitled to recover reasonable attorney fees from Michael's estate. *In re Martin, supra* at 723. The only question that remained to be decided was the reasonable value of the attorney services incurred.

It appears that the trial court felt that attorney fees were not warranted because, in its opinion, Michael did not benefit from respondents' participation in these proceedings since respondents did not prevail in their efforts to foreclose the possibility of withholding or withdrawing Michael's life-sustaining medical treatment or to remove petitioner from representing Michael with regard to such a decision. We disagree.

As we noted in our original opinion, conflicting evidence existed regarding Michael's condition, level of functioning, and previously expressed medical preferences. Additionally, at the time these proceedings commenced, the law in Michigan was unsettled with regard to the legal standards that govern a decision to withhold or withdraw life-sustaining medical treatment. Indeed, even the trial court was of the initial opinion that, consistent with respondents' position, the law did not permit the withholding or withdrawal of life-sustaining medical treatment under the circumstances of this case. See *In re Martin, supra* at 712-713. Accordingly, as we explained in our original opinion:

> Under the circumstances, we believe that Michael can be said to derive a benefit from a proceeding designed to ensure that his present capacity to decide his own medical treatment is fully explored and, in the event it is determined that he lacks the requisite decision-making capacity, that his medical treatment preferences or best interests are likewise fully and adequately considered and protected. This is particularly so where an erroneous determination will result in the termination of Michael's life against his

> wishes or best interests. We believe, therefore, that the rationale of *Becht* and *In re Valentino*, [*supra*,] is applicable to the case at hand and allows Michael's estate to be charged with reasonable attorney fees incurred by respondents in their efforts to ensure that Michael's condition, intentions, and best interests are fully considered and protected. [*In re Martin, supra* at 722.]

Thus, while respondents themselves may not have prevailed, Michael still derived a benefit from their participation in these proceedings.

Respondents assert that the information contained in their itemized list of attorney services is sufficient to enable this Court to decide the issue of reasonable attorney fees. We disagree. Given the trial court's ruling, a hearing was not conducted on the question of reasonableness, nor was petitioner permitted to make a record of her specific objections. Consequently, the record is insufficient to enable this Court to properly review this issue.

Accordingly, we remand this matter to the trial court and direct it to conduct a hearing and decide the reasonable value of respondents' attorney services in light of the various reasonableness factors. We will again retain jurisdiction to review the propriety of the trial court's decision on this issue.

V.

In sum, for the reasons stated above, we find no error in the trial court's determination that withdrawal of Michael Martin's life-sustaining medical treatment is legally proper in this case and that petitioner is a suitable person to represent Michael with respect to such a procedure. Although we are remanding for further proceedings with respect to the matter of attorney fees, because the matter of withdrawal of life support is separate and independent from the matter of attorney fees, proceedings

designed to effectuate the withdrawal of life-sustaining medical treatment should not be delayed pending litigation of the attorney fees matter.

Affirmed in part and reversed in part in accordance with this opinion. We retain jurisdiction on the attorney fee issue only.

/s/ John H. Shepherd

/s/ Myron H. Wahls

/s/ Mark J. Cavanagh

APPENDIX C

STATE OF MICHIGAN
COUNTY OF ALLEGAN
PROBATE COURT

87-44115-CG

IN THE MATTER OF MICHAEL MARTIN,
A Legally Incapacitated Person

ORDERS AND FINDING
FOLLOWING REMAND
FROM COURT OF APPEALS

At a session of said Court held at the City of Allegan in said County on the 7th day of October, 1993.

PRESIDING: HON. GEORGE A. GREIG, Probate/ Juvenile Judge

This matter having been remanded from the Court of Appeals for further hearing and findings and this Court having held further hearings on September 1, 2, 3, 7, 8, and 10th, 1993, at which this Court heard and considered the further evidence and arguments of all parties, counsel and other interested persons; and this Court during the course of these proceedings, having made specific findings and conclusions per the order of remand from the Court of Appeals, which reasons, opinion, findings and conclusions were made in open Court, upon the record, and are adopted herein by reference thereto as if set forth herein in its entirety; and the Court having considered all of the evidence, testimony and arguments from both the original

proceedings and the proceedings following remand; and the Court being fully informed in the premise:

IT IS ORDERED AND ADJUDGED by clear and convincing evidence, that the ward, Michael Martin, does not have, nor will Michael Martin regain the requisite capacity to make the decision himself to withhold or withdraw life sustaining medical treatment. The Court so specifically finding by clear and convincing evidence as set forth upon the record that the ward, Michael Martin:

1) Does not have sufficient mind to reasonably understand his condition;

2) Is not capable of understanding the nature and effect of the treatment choices;

3) Is not aware of the consequences associated with those choices; and

4) Is not able to make an informed choice that is voluntary and not coerced.

IT IS FURTHER ORDERED AND ADJUDGED by clear and convincing evidence as set forth upon the record, that the ward, Michael Martin, prior to losing the requisite decision making capacity, previously expressed his medical preference regarding the withholding or withdrawal of life-sustaining medical treatment to decline the treatment under the circumstances presented.

IT IS FURTHER ORDERED AND ADJUDGED by clear and convincing evidence as set forth upon the record, that Mary Martin is a suitable person to represent the ward/patient herein with respect to the medical decision in question and the petition of Leeta M. Martin and Patricia Major to remove Mary Martin as guardian and conservator for the ward, Michael Martin, be and is hereby denied. The Court in addition to all other testimony and evidence did, in arriving at the above determination, specifically considered the testimony and evidence offered by and on behalf of Leeta M. Martin and Patricia

Major concerning any possible bias, prejudice, conflict of interest and/or improper motive on the part of Mary Martin.

IT IS FURTHER ORDERED AND ADJUDGED, that the demand for Jury Trial by Leeta M. Martin and Patricia Major, be and is hereby denied as the request/demand for Jury Trial was not in the first instance properly preserved as no jury fee was tendered or paid to the court as required and as more fully set forth in the opinion of the Court on the record early-on in the remanded proceedings.

IT IS FURTHER ORDERED AND ADJUDGED, that the petition of Leeta M. Martin and Patricia Major for payment from Michael Martin's estate of their personal attorney fees and costs in claimed sum of $135,192.17, prior to any further attorney fees and costs following further proceedings on remand or further appeals therefrom, be and are hereby denied as being unreasonable under the totality of circumstances for reasons more fully set forth upon the record. The Court specifically finds the sum of $20,000.00, so paid by the estate prior to the remand to be more than reasonable under the total circumstances of this specific guardianship case. (This Court would parenthetically note that a dangerous precedent would be set so allowing hundreds of thousands of dollars to be drawn from a ward's estate and from wards' spouse and children by non-interested party persons (as defined by court rules) in guardian/conservatorship cases in Probate Court seeking to ultimately establish their own personal desires, positions and beliefs. It is equally unthinkable and "inequitable" that a prior petition, as is the common practice, not be filed and heard for general approval in advance to expend hundreds of thousands of dollars to pursue a cause or course of action allegedly on behalf of a ward. Such would address the "benefits" anticipated to be derived by the ward and/or the need for representation in addition to a Guardian Ad Litem, as

oppose to the personal desires, positions and beliefs or disagreement with a wards previously expressed medical treatment preference, of the non-interested party persons.) The Court, as set forth in the ruling upon the record, did not find it necessary to hear and determine specific objections to specific portions of the $135,192.17 claim for Attorney fees and costs as desired by the estate and which is reserved if found necessary pending further appeal. The Court reserves the question of assessment of costs against Leeta M. Martin and Patricia Major pending further appeal.

IT IS FURTHER ORDERED AND ADJUDGED, that Mary Martin be and is hereby continued as guardian and conservator for and on behalf of ward, Michael Martin, with no restrictions or limitations on her authority or discretion as to medical decisions for or on behalf of ward, Michael Martin, or her discretion to follow Michael Martin's previously expressed medical preference to decline and withdraw the present life sustaining medical treatment. Accordingly, it is requested under the circumstances, that the Court of Appeals reconsider its ruling regarding this court's earlier injunction against Leeta M. Martin and Patricia Major from interfering in the medical treatment of ward as all elements refererd to by the Court of Appeals necessitating it's issuance have been clearly established.

Dated: October 18, 1993

/s/ George A. Greig
HON. GEORGE A. GREIG
P 14362

APPENDIX D

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF ALLEGAN

File No. 87-44115-CG

IN THE MATTER OF: MICHAEL MARTIN,
A Legally Incapacitated Person

DAY SEVEN
HEARING ON REMAND FROM
THE COURT OF APPEALS

Before: HON. GEORGE A. GREIG, Probate Judge

Allegan, Michigan—Thursday, October 7, 1993

* * * *

THE COURT: I think that it should be clarified first, that there have been a lot of arguments made a long the lines of what everyone believes should be perhaps the law,—what should be the applicable consideration,—what is right, what is wrong, all coming from their individual positions. We have heard doctors testify as to their beliefs, what they would do, what they wouldn't do,—what they think is paramount to assisted suicide. I think that we have to know that,—and this Court would be derelict in it's duty if it didn't follow the law. It's why this Court has not allowed to get into the ethical argument as to what everyone thinks that the law should be, or what it shouldn't be.[] For this Court has been told by the Court of Appeals what the law is, and I think that you just,—Mr. Hess has just made that quite clear, that they have

spelled it out—one—two—three—four,—here is the law. I had some latitude in the beginning, because of the lack of a lot of interpretations of what the law is, or should be.

I am not,—I was not elected God here and I wasn't elected King. I am a Judge. I was elected to be a Judge to follow the law and determine the facts and apply the facts as I determine them to the law as it should be interpreted to apply to the facts.

Now, I have mentioned this before and I want to mention it again, the context in which this Court is involved, and that is, we are the Probate Court. We are here because there is a guardianship. The Probate Court has traditionally been involved in all stages of—and ages of people. We have been known as the Court involved from the cradle to the grave, or the womb to the tomb, and literally we are involved at all stages.

We are on protection of the children on the juvenile side of the Court, which is a division of this Court and I personally am involved, there is but one Judge here in the county of Allegan, which is myself in this court.

We are involved in the guardianship of youngsters, the guardianships of adults in various stages of disabilities either due to age, or accidents.

Mental illness, we get involved in the commitment of mentally ill people to commit involuntarily to state hospitals.

Adoptions,—we have happy events, we have some very tragic events, but we have always been known as the Court that has always been very attuned and I feel that we are very attuned and the opportunity to be very attuned to the various stages of human development and human interactions, because we deal mainly in those areas in human relationships.

Seldom do we get a real legal issue that we have to go to the books to research. The law is usually quite clear in the area. It's usually a matter of what are we going to do? What is fair and reasonable given everyone's rights? In that sense we are different than the other courts.

For the persons who are under some type of a disability, whether it is a child or a ward, as in this case, we always appoint somebody on their behalf.

If you have a child you automatically get an attorney in a neglect case or an abuse case, or a mentally ill case. As an adult they get a Guardian Ad Litem Visitor to go out and check ah,—in a wardship of an adult. It is different, because the emphasis is on that person in this court. It's different than like in a divorce action in the Circuit Court where the child is caught in a—say in a custody battle, or a visitation, or a support battle. Nobody is representing the child in those cases. They have,—the mother and the father are both represented.

Here the emphasis is on the disabled person, either by age or by medical condition, or mental condition.

I am concluding my 17th year, and you think that you see everything and you are totally surprised by what comes in next,—of what people can do to each other, or the situations that people get themselves in and the tragedies and the pure accidents that happen.

Now, at this stage, within that context, the Court is called upon specifically in certain situations in this State of Michigan, and the State of Michigan has been the leader, if not—or one of the earlier leaders and I believe the leader in banning death sentences. I think that was what,—back in 1840-1850 somewhere back in there that this—that the State of Michigan no longer permitted, or specifically did not permit the death penalty and it has been a leader in it's reverence for human life in many ways.

Yet, this is the court where it is called upon by way of the new patient advocate type statutes where if it is not being carried out,—there is a writing, a person wants certain, or does not want certain medical treatment and it is not being followed, who do they—which court are they required to go to by statute, but to the Probate Court to make the decision. Should that person's wishes be carried out? Should he be allowed to die?

We are called upon to make the same type of decision in young ladies who become pregnant and want an abortion and don't want to talk to their folks, or their folks don't want to give permission. They come to the Probate Court to—for this Court to determine if they should be allowed to make their own decision to have an abortion. Your not even allowed to tell the parents that they are in court asking for that.

It is hard to appeal that decision before it is known, or what that particular young ladies decision happened to be. That statute is a result of the efforts of the right to life group.

Why I am getting in to all of this is because I'm also—I happen to believe in the philosophy, and in the work of right to life. I don't know if that has been a secret,—or no secret. I have been a member of it,—I still am a member of right to life, but I can't—and I want to assure everyone that I cannot put my personal opinion above the law.

As I started out, I wasn't appointed King,—elected King or God here. I was elected as a Probate Judge and I know that there are some Judges who do put their personal feelings and make their own law, or refuse to follow the law, which wouldn't be fair to anybody, and they refuse to step down when they are unable to separate their personal feelings—their personal beliefs from their judicial duties.

The law is quite clear. If Michael were competent, and there is no argument that if Michael were competent, that he was of sound mind and he made a decision that he didn't wish to be treated any further and did not wish to have a feeding tube, obviously we wouldn't be here. You wouldn't need a Guardian. We never would have been involved in the first place, except perhaps while he was in the ah,—such a state of recovery.

It's quite clear in appointing guardians that we can't appoint a guardian for someone just because we disagree with their decisions, and that doesn't make them incom-

petent because they make decisions which are contrary to what the petitioner thinks is reasonable.

The Court of Appeals has indicated,—made it quite clear that we must first determine the competency of Michael Martin.

Let me find the test here.

You can't believe the amount of time that I spent reading over my notes, some of the voluminous transcripts that we have here,—the exhibits, the file. It's been an ongoing case and you literally live this case for periods of time when it is awaiting a decision.

The Court of Appeals has indicated on page five of it's opinion, it has set forth that the tests for determining if a person has a requisite capacity to make a decision concerning the withholding or withdrawal of life sustaining medical treatment is whether the person, 1) has sufficient mind of reasonably understand the condition, 2) is capable of understanding the nature and effect of the treatment choices, 3) is aware of the consequences associated with those choices, and 4) is able to make an informed choice that is voluntarily and not coerced. There is a note that special care must be taken to insure that sufficient information has been provided to Michael to enable Michael to make an informed choice, and the proof must be clear and convincing that the patient does not have and will not regain the capability of making the decision for himself.

Now we have approached this one on a number of different ways and before we had that specific outline as to the testimony back in October of '92, a year ago,—I think that we finished up on Halloween night,—or day, —afternoon, October 31, of last year. Here we are a year later and we have a little different guideline, a more specific guideline to follow here as to determine whether or not he can make his own decision.

The Court did not seriously believe that there was any argument that he was in any way competent to make his own decision at the last hearing back in October of '92, and just almost parenthetically had made a statement

that he wasn't competent. We made it even in the course where it was being somewhat suggested that perhaps he should be asked whether or not he wanted to have his tube pulled, and so that I made a ruling that he wasn't competent to make that decision and, of course, the Court of Appeals said, that you didn't get into a lot of reasoning for that on the record.

I'm still at a loss based on the testimony before the Court as to where the—where the sister and the mother are basing their position that they believe that he should be able to make that decision and yet,—on the testimony certainly clearly state that they don't think that he is able to make these decisions according to this criteria.

Sometimes they say,—Well, based on knowing the difference, perhaps, between life and death, that that in itself is sufficient. That means that he is truly cognitive and has a sufficient mind of reasonably understand his condition, capable of understanding the nature and effect of the treatment choices,—aware of the consequences associated with those choices, able to make an informed choice that is voluntary and not coerced, and obviously, the testimony has been if he was ever given,—read that statement he would have no idea what you were even talking about.

You can't have two thoughts in one sentence. You can't have a long sentence. You have to have rather short, simple sentence and that is his best. Then, you might be able to get a response, which is considered right, —and I put that in quotation marks,—by certain percentages that has been all over the board. Sometimes it's as low as 60,—some as high as 90 percent, with the caveat, that if you know what the right answer is then you know what the percentage is. If you know the right answer to,—is he wearing a red shirt and he is right 80 percent of the time that he is wearing a red shirt. But can he go to the ball game and eat a hot dog, is too complicated of a question. It's a two parter and it is being argued that he wouldn't understand that.

Special care must be taken to ensure that sufficient information has been provided the patient to enable the patient to make an informed choice.

How can Michael make an informed choice when the evidence is clear and convincing that he does not have the capacity to understand his condition, of where he is, how he got there, what he can do and what he can't do?

We have to go through and be more specifice here, but—

I want it futher understood that the Court does specifically find that the evidence totally before this Court is clear and convincing, that Michael does not have sufficient mind of reasonably understanding his condition; that Michael is not capable of understanding the nature and effect of the treatment choices; that Michael is aware of the consequences; that Michael is not aware of the consequences associated with those choices, and that Michael is not able to make an informed choice that is voluntary and not coerced. The Court would also find that he is not capable of retaining, or understanding sufficient information that would enable him to make such an informed choice. Equally clear and convincing is that Michael, of course, does not have, as already indicated, and will not regain the capability of making those decisions for himself. The evidence is clear and convincing that Michael is at level of which he will not progress.

Dr.,—where are my notes here, I want to get the right name here?

Dr. Cranford, when he came in with his chart, showed the brain, the cut away of the brain, and we got what the CAT scans and the M.R.I.'s meant from a medical stand point as to why we are seeing Michael the way that we are seeing Michael. Why he appears to be happy because he is smiling. Why Michael is unable to be consistent, or have an ability to put together abstract thinking. It was the first time that the Court really understood all of the rest of the medical testimony. You were able to make sense out of what everybody was observing and

why everybody is interpreting it based on where they are coming from. The rehabilitations people,—the specialists are in the business of rehabilitating.

Critical care people are in the business of seeing people at some of their worst times medically,—at deaths door. Some are very cognitive at those times. They explain what they want, what they mean, what they want to be. Death is something that they deal with on a daily basis, where as the rehabilitation people do not deal with death on a daily basis, in this Court's opinion, based on it's observations of the various facilities as they have been described and as the Court shall always respect the New Medico, or Greenery.

If a person becomes critically ill they are moved to critical care.

There certainly are some very optimistic people in the rehabilitation field. As indicated before, you have to be optimistic to survive in their line of work in that field. If you were a pessimist and a rehabilitation expert you'd be a mental case before very long with the frustrations, lack of progress. There is always hope for a rehabilitationist.

Based on,—and what's the unique position of being a Judge and not being an advocate is that you get the chance to sit back and observe and listen and not be wrapped up in attempting to show your clients case in the best light possible for your clients position. Your not wrapped up in the emotions of the debate of the advocacy what takes place in the course of trial and the preparation therefore and you can finally see why a Judge never followed your argument before when you were in private practice when you thought that was the best argument going,—because your not involved. This is a good case, as an example, of the involvement of counsel, as well as the treatment professionals involved at the various levels and various professions.

There was testimony early on that it is common in the rehabilitation field for those performing rehabilitative serv-

ices to see things that, perhaps, nobody else can see.

I keep going back in my mind to the game of checkers that was described by Mr. Stahl. The game of checkers that ah,—with the therapist with the large checkers with the little loop thing, or whatever, to make them stand up so that somebody could hook them with a finger, or whatever they were using to be able to lift that checker and move it to another spot. The game of checkers with Michael that was observed, you testified to it somewhere in here. I wish that I could find it real quick again here so that I could be exact, was that it was Michael's turn and which checker do you want to move? Nothing. So, the checker board was moved over, closer, under his hand,—the one hand that could move the checker. Michael, it's your turn to move, or words to that affect, and no reaction. The board and checkers were moved to a point where it was,—the loop was put over the finger of one of the checkers and the board placed down and there was the checker dangling from his finger and, —where do you want to put it Michael? Nothing. The board is moved over there,—it is placed where there is a blank spot underneath the checker. The checker is pushed off, and the comment is made,—Good move, Michael. A game of checkers was just had with Michael and now it is being argued and portrayed as an interaction, as a social event, as recreation for Michael.

We've heard the uno game similar to that. We've heard the bowling.

It's hard to say that some of these witnesses aren't credible. It's just that they are so,—they have their own individual biases and prejudices. I hate to come down on them in the sense that they are incredible, because they believe what they are seeing.

I, for one, if there is any hope, would certainly hope I get somebody that would work that hard with me also, and they did. They worked very hard with Michael and this Court believes that Michael came to the point where rehabilitation was not gaining. It came to the point,

as Glenwood rather clearly set forth, is you make some determinations. You make some testing and you determine if rehabilitation and the efforts are going to result in any progress. It was clear that Michael's progress was not going to progress any further and that basically he was put into a maintenance program. I don't think that there is any question that Michael is at the maintenance level and stage. It is this Court's belief that he has been there for quite a period of time.

It is hard,—I just can't imagine under the total testimony that the Court has heard, that Dr. Zetusky is able to give a number, an intelligent quotient to Michael. This has nothing to do with his education.

Dr. Zetusky stated when he testified that he spent considerable time with Michael, that he only did testing at times when Michael was responsive and answering correctly. Correctly by whose determination wasn't quite clear, other than what Dr. Zetusky thought would be a correct answer. That if he wasn't responding, quote "correctly", or wasn't cooperating, or was turning away, he didn't test him any further. He eliminated all of the—what he thought were the not appropriate response times. Talk about subjective. We're getting back to the Ranchos, —the Ranchos,—what was the word again?

MR. BRODER: Ranchos Los Amigos, your Honor.

THE COURT: The Rancho's pegging, as far as,—I think that it was quite clear that it was just basically something to determine where the patient was in the first stages of following an accident. A lot has been—a lot of arguments back and forth here, which the Court does not put a great deal of stock in based on the type of testimony, how subjective it is. Dr. Zetusky's testing, the Court would find, based on all of the testimony that was equally subjective, especially in view of the last witness, Dr.—I have to look him up now. Dr. Winfield was it?

MR. BRODER: Dr. Winstrom.

THE COURT: Winstrom,—that was it. Dr. Winstrom.

He said, boy,—I don't know how Dr. Zetusky did it. I tried real hard to give him that type of test and I

didn't ever get him to pay attention long enough and ah, —with any consistency. He must have had a great rapport with him, because if his information is correct then certainly with all of his back ground and with ah,—with what's there, I would have to say that, yeah,—that was a credible test. Then, assuming that Dr. Zetusky's report was all inclusive, and that is real questionable because then we have Dr. Cranford on an admittedly shorter time frame, going through a whole series of tests, word for word,—question for question, methods used,—responses received. There was a break in the action for dinner, as I recall. Who was also able to review the M.R.I. the CAT scans and what those showed between times that they were taken and there was a comparison opportunity for earlier to later tests, which showed,—and I don't know and I'm not going to sit here and pretend to remember all of the terms, but it showed actually what had taken place and the inability, because of where that was taking place,—that he would have the ability from a medical standpoint to be able,—to be credibly tested and have valid results, such as Dr. Zetusky claimed to have been able to obtain in the manner in which he testified that he obtained them.

Now, I'll have to give Dr. Winstrom credit. It's not easy to say that he was let go from the last facility,—the present one that Mike is in because basically even though he is in the upper two percent of intelligence in the world's population, for his statement, he is also in the lower two percent in his ability to put it in writing. He is unable to convey in writing and spelling, per his own admission, to put anything in the records that would tell the facility that he is working for what they should be doing based on what his recommendations are. I think he said, Well, I was let go. They didn't like by ethics,—or lack of them. And, that he really tried,—I really think that he tried to get a—some valid testing. He was unable to and he was quite amazed, in this Court's reading of him on the stand, of Dr. Zetusky's ability to get the cooperation and the responses from Michael that he considered valid and right.

Of course, that seems to be the big issue, what is valid? What is the right response? I can't think of one witness that really when pushed, when the actual test was given by the Appeals Court here as to Michael's capacity to make a decision that could say that he could do it within the confines of this test. It was all conditioned. It was all,—some just said yes in the beginning and then when pushed said,—well, but—. Everything was qualified.

I'm not sure because the petitoners, or the respondents as they have been called here,—the mother and sister here, they don't believe that he is able to make these decisions either when asked point blank each one down here,—they don't think that he can do that either. They don't think that he has that capacity.

I think that his sister, Patricia, during the testimony this time made quite a statement there which ah,—you could say that sometimes there are statements made that sometimes really hit home sometimes. It was a rather simple statement. They were going through,—I believe it was, were you ever,—were you and Mary ever friends at one time,—but you thought that maybe,—I'd like to find that here.

I forgot, that doctor, that one doctor put him on prozac too. He thought that he was depressed,—Michael. That one I found credible under the total circumstances and the total testimony.

During cross-examination by Mr. Stahl here, when she was getting to that she felt that Mike, her brother, had to knuckle down to Mary's demands and desires, but I was always a friend to Mary during that time and basically you kind of made a broad statement that it was Mike's life,—it was how he wanted to live it, and I thought, well this is what this whole case is about. This is Mike's life. This is how he wants to live. This was before the accident. Believe me, I wish that Mike could say what he wanted to do. It would be easier for Mom, and Sister and Mary, and certainly the Court. I think

that you have all agreed already that if he was capable of making those decisions in the traditional sense, and that is what he wanted, that you wouldn't be arguing. He could look you in the eye and say,—Mom, I don't want to live like this. Please do something. You wouldn't fight it. I think that you all made that quite clear.

We all agree that any statements that he made that if he was competent in his own right to make these statements, had the capacity to make the decisions, according to this test, then we wouldn't need a guardian to do those and we would be following what he wished to do.

Obviously, the Court has decided that he does not have that capacity, so we have to decide if there were any pre-accident statements that would,—or can be used, and we all,—there isn't any argument over basically what those statements are as far as being part of the record here and who made them, who heard them and over what period of time that they were made. It sounds like the first one, obviously, was some 25 years ago when you were a teenager,—just a teenager. You were 13 and he was what,—16-17 years old, as I recall,—that he certainly didn't ever want to be on a respirator. I think that was when the respirator statement was made,—pull the plug. Then later, during the course of coffee breaks where his buddies at the school there, Godwin, that he didn't want to be a vegetable.

As I commented before and which wouldn't appear on a cold record,—you never saw such reluctant witnesses in your life as these two guys from the coffee club. They sure didn't want to say anything that they were—anything—any of their testimony that was going to be responsible for Mike dying. Oh sure, he made certain statements,—but he sure didn't mean it this way. It isn't going to be anything that I'm going to say that is going to cause Mike's life to be ended here, based on my testimony. As I recall, they had to be subpoenaed. They weren't,—they were not voluntary people.

Even under those circumstances they did say that Mike talked about the subject and it does appear and

the Court would find that he did talk about it in the sense of being[] not being a vegetable. Whatever that means.

There has been some testimony as to what that generally means to doctors, especially in the critical care unit. In talking with patients who are cognitive,—they want the doctors to promise that they won't let them be vegetables, as we heard from Dr. Patty Pat, (sic) was it, that they would ask him all the time,—what do you mean? Does that mean that you want to do this, this or this? And then it comes down to,—they don't want to be—they aren't talking persistent vegetable state in the technical medical term. They are talking the total care type of person, where I can't do anything and I'm just lying there and I have to—you have to change my diaper,—I'm incontinent, I'm—I have to be fed. I have to be moved. I'm paralyzed. Whatever, these were all things at those times what they mean,—they don't want to be a vegetable. If that was all that we had then that would be subject to me,—then we would have to start interpreting what Michael meant by not wanting to be a vegetable. But, we have something further. We have the conversations with his wife and, of course, that is being argued that that is suspect, a man talking to his wife, based on allegations that what the wife thinks or says, or what has happened since then,—since those conversations, there was an accident, there was a settlement. There was a long period of time of being a single parent and admittedly looking for some male companionship, so that we should disregard what Mike may have told her, or perhaps, Mike never told her at all.

One of the jobs of a trial judge is to determine credibility of all the witnesses, and if I had to pick a credible witness in this particular proceedings from day one until today I would have to pick Mary Martin has a most credible, if not the most credible witness the Court has heard through out these proceedings.

And, as she said, she is not being guardian in this case, it is not a popularity contest, and that it isn't.

Look what's happened with her family,—her extended family.

The Court believes that the conversations took place.

As I say, the Court has been in a position to observe the emotions of witnesses in very emotional settings. We have hearings many times when we are terminating parental rights, which is probably the next thing to death for some people when they are not allowed to see their children any more and their reactions and their pleadings, and you—you certainly get a feel for who is credible and who is believable and who's fudging and who is out right lying.

The Court believes that these conversations took place and they were of the nature as described by Mary Martin, that Michael did have some real feelings, that not only to talk to his wife, but he, when the occasion came up,—I believe that there was some accident that prompted the conversation around the coffee club and it was on two different occasions, it wasn't one. And it was,—I don't know what prompted the conversation with the sister 25 years ago, but it was something that—that certainly Michael thought about and although I firmly agree that such decisions, and I believe and think, and as I ruled, that such decisions as important as those should be required to be in writing, or that a person must be terminally ill, or in a persistent vegetative before they kick in, that I was clearly overruled by the Court of Appeals. They say, no way. You can't do that. You can't limit it to those narrow circumstances. You are denying Michael his rights.

Whether you accept it or not there is a right to life and there is a right to die. It was Michael's determination that he didn't want to live in circumstances such as where he would be a total care person,—where somebody would be washing his genitals, changing his feed tube, he didn't specifically get into a feeding tube,—I don't believe as such, he wasn't in this Court's opinion, setting forth an exclusive list of factors as to specifically what

kind of circumstances would dictate that he be a total care patient. He didn't want to be a total care patient. He didn't want somebody changing his diapers,—washing him, feeding him, paralyzed, unable to communicate.

There has been a lot said about the communication devices and the Court tried to personally observe it's use and was unable to see it being used, although it did have the opportunity if it was going to be used in an attempt to get Michael to use it, and I already stated that on the record last October, to what the Court did observe of the attempts for him to attempt to use the communication device, as well as Mr. Stahl's observations and others. It just goes to the credibility of ah,—or again, I hate to use the word credibility, but seeing what you want to see by the speech therapist, that he had all of these incredible disclosures which he is unable to duplicate when anybody else is there that is not connected with the facility, such as Mr. Stahl, or myself, Mary Martin—and it was a good day, it was explained. Now, he's had two good days only in the sense of when he is able to use it and spell out something. If he were able to use it as well has he plays checkers, and I really believe that he was being assisted based on total testimony of all of the different professionals coming from all of their different biases and prejudices, and they all have their own and that is their right to do. They have that right as a professional to have those biases and those beliefs. The Court doesn't have that same latitude if it is going to follow the law which it was sworn to do.

MR. BRODER: Your Honor, I don't want to embarrass the person on my side who needs a break,—but could we take a two minute break?

THE COURT: Oh sure, go ahead.

I want to read my notes. Everyone is welcome to take a break here.

(Court recessed at 4:48 p.m.)

(Court reconvened at 4:54 p.m.)

THE COURT: Let the record show that we took a short break.

All of the parties and counsel are back in the courtroom.

I understand that I am not speaking very loud, your having a hard time hearing me back there. I tend to talk in a much lower voice. It's nothing that you are trying to do, your unaware of what your voice is doing. I'll try to keep that in mind also.

The Court wants to emphasize that it did, so that there is no misunderstanding here, that there is clear and convincing evidence in this Court's opinion that Michael previously expressed desires regarding life support under the conditions in which the Court finds the patients to be, —are that he does not want these particular life supports. He does not want to be in the condition in which he is and that the condition in which he is, is in fact supported by the nutrition and hydration tube.

I should also go in at this point then,—as to the ah,—this is, again, this is a guardianship case. It is a case of basically first impression,—it is one in which a guardian was duly appointed for Michael initially, and was temporarily, and as it turned out and before Mary was, because Mary herself was incapacitated herself as a result of the same accident, and I could see, obviously Mary's growth from the first time that I saw her when she was able to attend Court, and then see her in more recent times and thereafter I could see the improvement in Mary, personally, from what she was able to do when she was first brought to Court.

A guardian is appointed and that guardian's responsibility is to make medical decisions. I want to emphasize that it is not the Court's responsibility to make medical decisions. The Court appoints the guardian when it is shown that an individual needs a guardian based on the—when the guardian can be appointed and that is spelled out by the Probate Code,—the Revised Probate Code in the State of Michigan and Michael fit that requirement

and those legal definitions of an individual needing a guardian, and continues to, as the Court has already indicated, especially in this area of decision making, or his lack of ability or capacity to make the decisions which the guardian is being questioned as to whether or not she should be able to make those decisions on his behalf. Or, more factually, that she is not making those decisions for him. She is enforcing his decisions that he has made when he was in a position to make those decisions, is a fair statement of the position.

But we are here by way of the Probate Court and we are here by way of a guardianship, and as such under a guardianship, and I started to go through this before, the interested parties in a guardianship in this particular case would,—for Michael, would be Mary and his children. Those are the interested parties. In effect, although not formally done so,—it was allowed for the sister and the mother to intervene. They were allowed to be heard on—to have a voice in this proceedings in this Court, and we have already gotten into, they were allowed to,—again by Mary, to have some funding, to allow them to be heard, and I have already ruled on the funding part. I don't wish to get in to that.

This is unusual in a guardianship case because in a guardianship case we have a Guardian Ad Litem. An independent person who is not involved to ascertain and carry out the best interest of the ward, or alleged ward, which we have done here.

As I said before, we don't go around interviewing the Guardian Ad Litem's as to—are you,—are they going to be an adversary?, parse. They come, hopefully, with no preconceived notion and they arrive at their own decisions and recommendations based on their own evaluation. They may be using the same sources that others may look at, but they are allowed to make their own decision, their own recommendation. They are bound to follow no one else. It is not unusual that a Guardian Ad Litem will

come to the same conclusion as the petitioner. It is equally not as unusual that they disagree in some fashion, and short of a complete fraud in an attempt to appoint a guardian for some fraudulent reasons for an other wise competent person, it is rare that they are totally disagreed with some aspects of the need for a guardianship. They may be whether it should be partial as oppose to total, and that is the beauty of the Guardian Ad Litem, they can check out the motives behind and the ecessity and give the Court an opportunity to make sure who they are dealing with. We don't know everybody in town. We don't know everybody in the County. We have to rely on what is before you and your own senses that you have developed over the years, plus the independency of a Guardian Ad Litem in their independent observation. It's a double check. It's a safety. And that was employed here.

Michael has had a guardian for legitimate reasons since early on after the accident and Mary now for the most part has been that guardian and we've all heard throughout what Mary's attempts were and as you get to spend so much time with each other here in the courtroom you can imagine what Mary would be like in a nursing home telling off the people—what kind of care she wanted for Michael. I don't think that she would hesitate to mince words and that she is a very out spoken person, or at least I perceive her to be an outspoken person. She is not going to allow anybody to cow tie her down when it comes to Michael and what kind of care that Michael will receive. That he got his share, he got his hair cut, he kept his moustache, he kept ah,—wahtever,—his glasses, that they kept them on him, that they kept him clean. We heard the early times when everybody knew where Michael was because you could smell Michael the minute you walked in the door and wherever the smell was the strongest that was where Michael would be, due to the tube, the colostomy rather, the one that was not properly

maintained. Anybody that has been around aybody knows that it takes an effort to maintain those under the best of conditions.

It is noted that the Christian Nursing Home,—it was emphasized that it was necessary that they thought to call Protective Services, that Mary wasn't agreeable to certain medical treatment and then as I recall the testimony, I think that that was the same nursing home that broke his leg, was it not, and didn't tell anybody? I think that that was a subsequent settlement of a lawsuit with respect to their treatment of Michael, that by trying to stand him up.

And we've all seen, of course, we haven't all had an opportunity to see Michael in person, but we have all seen videos of Michael in his chair, and the descriptions of Michael that he stiffens out in a rigid state, paralysis on the left side. Michael is—he can't roll over in bed. He is a totally kept person and needs constant maintenance to maintain him in a friendly, comfortable position which would not break down his skin. They have to turn him. He can't even roll over.

The fact that Mary,—it must be five o'clock. The system shuts down around here. That is why it got so quiet.

The—that Mary has, once she was capable of being up and around and recovering from her own traumatic injuries, learning, being a sponge of information as to what Michael was doing, where he was,—what his outlook was, talking to all different people, which she said that she did and which, obviously, she was from the number of people involved—and had been involved with Mary with Michael from day one, that she determined early on based on Michael's wishes that she would attempt to carry out Michael's wishes. That should be no surprise. I don't think that it should be a surprise to anybody, other than when it came a time to—I'm going to do it now. Then, it was—You can't do it. Now your a bad person. Your an okay person up until then. I mean we didn't really like

you, but I mean, we tolerated you,—Mike's life,—live it the way he wants to.

There is a big difference between Mary and, unfortunately, his sister and his mother, in that, Michael, or excuse me,—in that Mary has a reason why she is taking the position. She wants to respect Michael's wishes, —Michael's statement, Michael,'s pre-accident desires for Michael's benefit. Whereas the Court determined that sister and mother are doing it, and their opposition is for their own interest. And I'm not saying that that's not wrong, in the sense that this is your brother, this is your son, and you want to keep him around in any way that you can. But from a legal basis, we are only here because, as it has been testified, Mary wants to carry out her husband's wishes. This Court finds that and really can't believe that he can really make those decisions himself. I'm not sure where the adversity on this case arose, other than the personal desires and their own prejudice of the mother and the sister for their son and brother.

There has been a lot of smoke screens throughout. You have to try and sit back at all times and think,—what are we really here for? What are we doing here? Who are we really here for?, and I've had to do that on a number of occasions. Yet get off on tangents that ah,—of comparing facilities here, and that for the purpose of showing that Mary is not a good guardian, or a good person and had some alterer motive and that we have a facility as the New Medico,—the Greenery, who,—it just—perhaps that is why we have the medical conditions we have today in the sense that the President and Hillary Clinton there are going into some type of a control, not everybody will have the same opportunities and there is a limit on cost here. But here is a facility, the New Medico, or the Greenery as it is now called, who is receiving, and I guess that just goes to show, they were receiving what,—$250,000.00-$260,000.00 a year and,—or and we are going to kick him out for not paying another $5,000 while he is out getting some medical treatment which they can't

give within the facility. You'd think that they would be wondering what's happening? How is he doing? Giving Mary a call and trying to keep her happy and get Michael back so they could have that income? No, the income wasn't important and there was no follow up, and they say, or it has been portrayed that nobody followed up because Mary said, You can't do that. Now,—I don't know. Mary has an awful lot of power here. She even went to Butterworth, she even told Butterworth Hospital Bioethic Committee what they could consider in determining whether or not they would allow the tubes pulled, and what they couldn't consider. Now that's a lot of power. The Doctor's said, Gee, we'd sure like to look at the records from the Greenery, I mean, the New Medico, but I can't do that. All of the doctors involved,—the treating doctors, the receiving doctors.

It is the Court's opinion that the Bioethics Committee, if faced with those choices, if it was really necessary, with everything that they said they needed to look at, that it would be their decision to say,—We need that information, or we want that information, or we can't you a decision here based on what is before us. They did give an opinion based on what, obviously, or at least by the result of what they believed was sufficient to—a basis to give an opinion, and we can't blame Mary that you think that they should have done it on some other basis.

Again, they are dealing with the Guardian. The Guardian has been authorized by the Court to make decisions on a ward's behalf. I dare say that if you,—if mother and sister went in and said,—You are going to treat him this way, and you had no guardianship, they wouldn't listen to you. They shouldn't listen to you. They have to get their medical authority from the patient, which they couldn't do in this case, so then the patient's guardian,—which they did, not the mother,—not the sister.

Now I keep,—it looks like I keep putting you down all the time. I don't mean to. You spent an awful lot of

time, at the initial time,—as the testimony indicated, a whole four months or so, that Mary was unable to be of assistance. There were some obviously genuine concern for your son and for your brother, and I don't discount that in any way.

I'm trying to look at it from a legal stand point, that —of where you fit in to a guardianship and we don't have a written document here that comes in under the statutory provisions for authorizing, or decline medical treatment, which provides some guidelines also. We are dealing with a guardianship here and it is a difference of an opinion, but the opinion, as I indicated, are based on your own personal desires,—not that of Michael's. Whereas the Guardian's is based on Michael's desires and expressed wishes and, as indicated and what the law is, that if you find that he has expressed those,—and the Court can and does find by clear and convincing evidence he did make those expressions and he did mean this condition,—that he doesn't lose the right to make those decisions by becoming unable to make any further decisions.

It's been argued that, well he can change his mind. Well, certainly anybody can change their mind,—if they have the capacity to communicate and the ability to change your mind,—you have to have a mind to change. I think that it has been shown that he is unable. Unless you want to say,—a person can change their mind if they are consistent 51 percent of the time? Or three out of five times that you ask him? Or six out of ten? Or do you want 2 out of 25? Is that how we are going to make the decision? One way or the other? I don't think so, but that is what is being asked here. We'd have to put it on a percentage. It has been argued that he has certain percentage reliability to know the right answer, and that is the big assumption that I think everybody is making here that every one has their own assumption of what the right answer is other than when it is an obvious one and

even then he's not 100 percent,—like the colors, day, night,—radio on, radio off. What is happening? Immediately there to be seen. If you get into the abstracts then you have no idea. He doesn't even know his wife here at times and certainly he has not known who his children are,—or that one of his children is deceased.

The smile,—I guess I have to comment on the smile. The smile in this Court's opinion and based on the best medical evidence before it, is a condition of his brain damage and it is not a reflection of an emotion of happiness. He'd be happy at some of the really gross things and he'd be happy at some of the saddest things, if that be true that it is an emotion showing happiness.

I think that the most incredible person to testify is the brother, George Sears. Now, I already had planned on commenting and even though it was suggested that I should,—I had already planned it. All during this hearing, at least from day one the Court was under the impression that Mary went to talk to her brother about whether or not she should get a divorce. That was thoroughly conveyed to the Court that she was the one that initiated and was going out and that, of course obviously, she raised the issue that she was thinking about a divorce. Her brother was, you know,—her brother was the one that she contacted. It was clear from the testimony of the brother that it was his contact following the last hearing. Well,—why don't you get a divorce? Now here is a man that would be an embarrassment to the right to life group, I think. A totally unbending, unreasonable, don't confuse me with the facts type of person. I don't want to hear anything. I have my opinions and you can't change it. Whether it is reasonable or not it doesn't make any difference. A man who professes not to even know, from the testimony here, that there was a $3,000.00 gift to his daughter, given when everybody was there, and he didn't even know that it existed. There was credible evidence that he may not have known about

the $1,000.00 one, later one,—it was to his wife, again, for their daughter.

And that he doesn't believe in divorce. He doesn't believe that something might not work out, and yet he sacrifices one of his religious principles for another. I'm not sure where he is coming from. And that some how, even though he only come up because Mom and Dad,—his Mom and Dad said that it was okay to come up, not to see his sister, or his nieces and nephew,—or his brother in law,—but for business, or to attend the funerals of his Mom and Dad (sic), or for his own move out of State, and yet somehow he knows—when he went through your house I don't know,—I'd like to know how he knew that there were tickets around,—lotto tickets around. He didn't even know who bought them and that you were financially irresponsible people because you gambled and because of the nature, or because of these tickets laying around that somebody bought. It had to be you,—at least that was what the inference was in the beginning and then when questioned later on it,—well he really didn't know, he just saw some tickets laying around. It must have been one of you. You were financially irresponsible and yet your the one lending him money.

And, the incredible,—the incredible,—Do you miss work, Michael? He shakes his head no,—and that meant he was under paid and over worked, because he knew from the past,—not that he had talked to Michael about it, but he knew from the past that he wasn't happy there because he didn't get paid well,—some thing to that effect. He read that into a head shake. Do you miss work? The head shake no,—had to mean underpaid, over worked. I'm still having a hard time with that one here. Incredible, —and sad for all the involvement that he has been in there,—he was more concerned that he wasn't invited to the niece's wedding because they were originally God-Parents.

Mary would give them Christmas—Christmas outfits early on,—he would play Santa Claus, and then these he

doesn't even come to you,—as I say, he doesn't even come to you Mary and say what his concerns were.

A man devoted to his mother and father, obviously, in some form, and very involved in your family early on and included in your family.

He thinks that you were a money hungry,—grubbing person. Completely incredible.

Looking through my notes here,—Dr. Rutherford, obviously felt that he was unable to have the capacity to make any decisions by the—was it, the R.N. at Glenwood didn't believe that he had any capacity to make any decisions.

Dr. VandenBerg, I made a note, that he can do movements on command 80 percent of the time as Dr. VandenBerg attested and that was just movements. He's a totally dependent person. He cannot help with his care in anyway, not cognitively especially as it applies to his care, or the objection of it and he goes right through the list and there is no way he can have the capacity to make the medical decisions pursuant to the test.

A lot was made of the fact that—and the conclusions that one jumps to here is that,—I believe that the sister goes and sees that he is on some type of I.V. and he doesn't look well at all, at Butterworth this last time, and now she is accusing Mary of stopping the tube feeding and yes,—the tube feeding was stopped at—as part of the treatment. It was not Mary's decisions, but as part of the treatment because of these kidney stones, and bowel obstructions and urinary track infections. Having food in those areas was not conducive to him being treated. It was immediately presumed that Mary had pulled the tube. Obviously, there is no trust.

Right now it is necessary to keep the physical therapy going in the sense that they have to keep moving the joints to keep them from contracting further, to keep the joints moving, to prevent the fetal state which would occur without any therapy.

I think it is obvious that without constant attention Michael would die a natural death.

And I've already ruled and it's already a legal established fact that the tubes are medical treatment, even though there is a dispute among the various factors as to whether it should be technically medical treatment. Well, —it is certainly a legal conclusion that it is, in fact, medical treatment and the Court agrees that,—initially agrees with that. Somethings I agree with, some things I do not. I do not agree that that is a form of medical treatment.

The thoughts that you have when you go through all of this over and over and—as to what you've heard in the past and what the American Indians would do. They were very attuned with their environment and their own bodies and when they would know that it was their time to come, they would go off into the hills and lay down and they would refuse any further nutrition and die. Today they wouldn't be allowed to do that with—with all the medical that would keep that person alive, unless they had some type of a written directive or had some statements before, if they found that particular person comatose in the woods there.

Michael doesn't have a choice at this time. He is totally dependent on others as to life or death and what life is. He is unable to initiate anything.

We've heard that he was able to turn a radio on with a head switch at one time. If you could keep the radio from being stolen and the T.V.'s from being stolen and I think that it has been said that there's been some five different forms of T.V.'s and cassettes and radios that have been stolen over the period of time that he has been in the various youth homes,—various nursing homes,—that were purchased for him and not his roommates and that at other times his roommates were the ones that had it and so it wasn't necessary to have two. Then the roommate would move so that last time he was without the color one and cable.

Mary has not been derelict in her duties to attempt to provide that which is necessary, or thought necessary for the maintenance of her husband.

It is interesting to note that Michael was so adamant in his statements to Mary that if she ever let him, or allowed him to continue in a totally kept condition as he is in now, in this Court's opinion,—that he would haunt her for the rest of her life.

We've all had an opportunity to hear Mary testify, and the Court finds that she is completely sincere in her desire to carry out her husband's wishes,—Michael's wishes and that money is not a factor,—was not a factor in the beginning. It is not a factor now, in this Court's opinion, although we don't,—the Court is not aware of the total financial settlement with Conrail, and the parties unfortunately,—or fortunately, I don't know,—are prohibited by a gag order from the Federal District Court from disclosing such—the full disclosure. We do know that it is a significant sum of funds that Michael received, and Mary received, and I have no idea what Grandma received,—what Michael's mom received, or if the sister received anything or not,—I don't recall. It sounds like they included a number of people,—almost like a wrongful death settlement, which the Court would be familiar with and the structured settlements that are capable of being made, especially with the railroad,—that is a different ball game altogether.

Needless to say,—there is a significant amount of money that is floating around,—that each has control over sufficient sums of money,—that it is this Court's opinion that money is not any factor in the Guardian's decision, nor is the fact that Mary has sought a male relationship of some type. I'm not sure of your age now,—but you must have been in your mid 30's,—35,—36, 37, when the accident happened and are now in your lower 40's,—a single parent trying to cope.

The extended family as we now know it to be,—which is almost totally lacking here is any supportive type of

roll. What was once a family that would get together on holidays and stood up in each other weddings—the Santa Claus's—are all disappeared.

As I state, I'm not sitting here passing morality here. I'm looking to see if you are some how prejudice, biased to a degree, that you are making decisions not in—not for Michael, but for yourself and I do not find that you are making decisions for yourself, but you are making the decisions based on the best medical evidence known to you, which has been set forth through out the course of this hearing.

I find no reason that she should be removed as that Guardian.

It was you, telling your brother, that you had no intentions of divorcing your husband when he initiated the topic.

It is interesting to note that Dr.,—I have a hard time pronouncing it,—is it Kreitsch? Is it?

MR. BRODER: Kreitsch, your Honor.

THE COURT: Kreitsch, the recommended plan here was that some type of appropriate basic nursing care, not to the point of pain. The focus would be not to expect gains, but to proceed on interactions and maintenance.

The rehabilitation one—the expert, a key witness, was not looking for any change, nor did he believe that Michael was competent to make medical decisions pursuant to this Court of Appeals test.

As I said, He was a very right to life oriented person, which is his right to be and that is not his belief. He firmly believes that any attempts to remove tubes would be some form of an attempted suicide, or assisted suicide. I make no rulings on those—on those basis as such. I'm not sure how that reads. I have never had an occasion to have to look at that particular statute, but it certainly if it ah,—and I don't know how that would—would correlate between the right of the patient to control his medical treatment and ah,—and an inability to carry out his wishes because of his physical limitations that were established in a legal manner.

Pat, the sister, during her testimony when questioned said that Mike couldn't put his wishes in writing and so they shouldn't be granted. I tend to agree with that position, but it does say in essence that Michael had some wishes. Even you were aware of some of those statements, you just don't agree with them.

The whole issue of the private investigator,—I won't even bother to refer to that,—other than the sister said that it wasn't her idea.

Let's just make,—again, when you get into some of the family history here, and unfortunately these matters involve getting into the family history of where the family is coming from, and I'm referring to the sister again, but Mary says that Pat said that if Michael was to die it would be better than living in the hell with you, and,—and Pat disagrees. She says,—no, it was more along the lines, that if Michael dies he is going to go to heaven, because he's been through hell here. It being taken as described in the context of not his medical condition withheld,—but his life previous to that and medical condition is hell,—is the way,—is the context in which it is offered anyway through Mary's testimony.

Which, again, why I keep emphasizing this is a guardianship matter and that it should be within the immediate family as a guardianship matter is in this court and once you start bringing in the total extended family as long as you have a competent guardian, you are going to get all,—he's gonna have medical decisions made by a committee,—which is like trying to get something done by committee,—you get an awful lot of opinions and nothing happens. You are unable to carry out your duties. It's not that you can't listen,—that a guardian can't listen to the input from all sources,—but the ultimate decision is that of the guradian. This is no different in these types of decisions than it is as to whether or not he—Michael, should be brought home, or put in a foster home,—or into a different nursing home or get a different doctor. Those are all decisions that you can get all kinds of advice on, a guardian can, and Mary can,—that every-

body puts their input in, but that is what a guardian does. They sort it all out and they are ultimately responsible for making that final decision. If they feel that the guardian is inappropriate they—other people can come back in and say we don't believe—we believe that she is abusing her discretion, or is failing to exercise her discretion and the Court then can review whether or not a guradian is continued to be the appropriate person,—and that is what we are doing here today with respect to Mary as being the guardian.

In that context, the Court is finding that the decision that she made,—well, number one we found that Michael still needs a guardian, that Mary is an appropriate guardian, and that her—she is not abusing her discretion as a guardian to make medical decisions along the lines of carrying out the wishes and desires of her husband that were conveyed to her and made known to her previous to the accident and previous to his incapacity, and previous to his inability to make—or have the capacity to make medical decisions.

Now why I put it in that context is because it is not the Court making the decision whether or not you wish to have, or allow Michael's medical treatment to be withdrawn. That is still your decision because you are still the guardian.

Based on the law that is given to this Court, based on the duty of this Court to follow the law, and it has been very narrowly defined, is that—it is your decision to make, that the guidelines have been met to allow you to exercise your discretion to stop medical treatment.

My job is not to second guess your decision as to whether they are right or wrong,—and that's the correct moral sense.

Personally, I might not be able to make such a decision if I were a guardian. I don't think that I'd enjoy being a guardian. I often remark and wonder how people can be foster parents for the grief that they have with some of the kids that we get. There are some jobs that some people are able to do that others cannot do.

I find that no alterer motives on your part, that you are carrying out your duties as a guardian with Michael's interest in mind and only his interest in mind and that your decision will be your decision as his guardian with restrictions by the Court. I'm not giving you any limitations.

If I felt that the Court should be restricting you then —then the Court would have to be replacing you because you wouldn't be carrying out your obligation as a guardian.

Your discretion is exercised based on a full analysis as required and outlined by the Court of Appeals here that there is clear and convincing evidence that he had these pre-accident statements that apply as required to his present condition.

Now, I don't want this to come back here. Are there any areas that I'm not covering? I suppose I should go through and make a more definite finding of what his condition is.

He certainly is a total care patient. He cannot walk, he cannot talk, he cannot swallow, he cannot take food in other than what he receives through the tube. He is paralyzed on the left side. He has limited movement on his right,—his right leg, his right hand,—or a couple fingers at best, perhaps somewhat of a pinching move between his thumb and his forefinger, which isn't reliable to a great degree. He is unable to—he doesn't have the mental capacity to retain information. I believe that it was described that he lives for the moment. He is not able to retain information from hours before,—or days, or weeks. He is a total care patent with no hope of ever getting better.

MR. JOHN HESS:—Your Honor are you maintaining the position that you did before, that he is not terminally ill and not in a persistent vegetative state?

THE COURT: I do. He is not. He is not in a persistent vegetative state, nor is he terminally ill in any common sense of the word. Terminal, obviously, if they pull the tube,—but no, he is not terminally—that he has

some disease at the moment that—such as cancer, or something like a type of cancer that would be medically said that he was going to die. Right now he is just prone to infections, obviously, but he is expected to have a normal life expectancy.

MR. JOHN HESS: Prior to the last hearing I think that there was an understanding between parties that there would be no action taken until the legal process had been exhausted. I assume that is still in place?

THE COURT: Well, I don't know. You tell me?

MR. BRODER: It is, your Honor.

THE COURT: All right, that means that you'll have an opportunity to appeal it, or have the matter remanded back and have the further decision of the Court of Appeals, which is waiting for this record to go back to them.

MR. BRODER: Your Honor, although I don't,—do not think that it is necessary in light of the Court's decision, I wonder if the Court is prepared to indicate whether or not it believes that the other decision making standards set forth in the Court of Appeals opinion has also been met in this case?

THE COURT: Do you mean the substituted judgement and best interest?

MR. BRODER: Yes, your Honor.

THE COURT: Or,—the trustworthy evidence?

MR. BRODER: Well, the trustworthy with benefits and burdens—

THE COURT: —Well, I think that we got in to that before.

MR. BRODER: I'm not suggesting that it is necessary for the Court to reach a conclusion.

THE COURT: No, I—right. I don't think that it's necessary to—

MR. BRODER: All right,—thank you.

I have nothing further then to ask of the Court

THE COURT: Is there any area that I should emphasize, or clarify to a greater degree? The Court said last time that I made some conclusions without putting the facts in.

There is a wealth of information here. I am trying to go through my notes and not trying to write an opinion before hearing the arguments, so I didn't write an opinion, obviously and I'm—or even an outline.

MR. JOHN HESS: I would question whether—is there,—will there be a written opinion issued on this?

THE COURT: Not in any sense of the word of a complete opinion. There will be an order adopting the opinion.

MR. JOHN HESS: Will you be issuing that order? Will you be—

THE COURT: Certainly,—right. Unless you wish to submit one. Do you wish to submit one—

MR. JOHN HESS: Then I assume that the 28 days—

THE COURT: —and—or not yourself? Would you rather draw your own—

MR. JOHN HESS: —We would prefer that you would draw up the order.

* * * *

APPENDIX E

July 19, 1993

STATE OF MICHIGAN
COURT OF APPEALS

IN RE MICHAEL MARTIN,
a legally incapacitated person.

No. 161299
LC No. 87044115

MARY MARTIN, guardian and conservator of
MICHAEL MARTIN, a legally incapacitated person,
Petitioner-Counter
Respondent-Appellant,

v.

LEETA M. MARTIN and PATRICIA MAJOR,
Respondents-Counter
Petitioners-Appellees.

No. 161431
LC No. 87044115

MARY MARTIN, guardian and convervator of
MICHAEL MARTIN, a legally incapacitated person,
Petitioner-Counter
Respondent-Appellee,

v.

LEETA M. MARTIN and PATRICIA MAJOR,
Respondents-Counter
Petitioners-Appellants.

Before: Wahls, P.J., Shepherd and Cavanagh, JJ.

SHEPHERD, J.

In these consolidated appeals, petitioner Mary Martin and respondents Leeta Martin and Patricia Major appeal as of right from the November 12, 1992, Allegan County Probate Court order which deneid, following a hearing, Mary Martin's petition as guardian for Michael Martin (her spouse) for authority to withdraw all artificial means of Michael's life support, including nutritive support, and also denied respondents' petition to have Mary Martin removed as guardian and conservator of Michael. Respondents also appeal a February 3, 1993, injunction enjoining them from interfering in the medical treatment of Michael and a separate order denying their request for attorneys' fees. We remand for further proceedings consistent with this opinion.

Petitioner and Michael Martin were married in 1972 and thereafter had three children. On January 16, 1987, Michael sustained debilitating injuries in an automobile accident with the most serious being a closed head injury affecting the bilateral hemisphere of his brain. The injuries significantly impaired Michael's physical and cognitive abilities, left him unable to walk or talk, and rendered him dependent on a colostomy for waste management and a gastrostomy tube for nutrition. Petitioner was appointed Michael's legal guardian and conservator. Michael resided at different nursing homes for the first few years after the accident until July 1990, when he was transferred to the New Medico Neurological Center (NMNC) in Howell, Michigan, where he was still residing at the time of the hearing.

On January 9, 1992, while Michael was being treated at Butterworth Hospital for an obstructed bowel, petitioner contacted the hospital's bio-ethics committee for the purpose of determining whether Michael's life-sustaining medical treatment should be withdrawn. On January

15, 1992, after consulting with petitioner, a family friend, a social worker, and Michael's treating physician and other nurses at Butterworth Hospital, the committee issued a report stating that withdrawal of Michael's nutritive support was both medically and ethically appropriate, but that court authorization would be required before the hospital would assist in the procedure. None of the personnel at the NMNC, nor other members of Michael's family were consulted or notified by the committee.

On March 19, 1992, petitioner filed a probate court petition requesting authorization to withdraw Michael's nutritive support. Respondents Leeta Martin and Patricia Major, who are Michael's mother and sister respectively, opposed the petition and also filed a petition of their own asking that Mary Martin be removed as Michael's guardian and conservator. An evidentary hearing was held from October 13, 1992, through October 30, 1992, on the petition for authority to withdraw Michael's nutritive support.

Petitioner said that Michael was a private but active person before the accident. She claimed he was always bothered by, and intolerant of, people who were disabled or dependent on others and often stated that he would rather die than be dependent on people and machines. According to petitioner, Michael would not want to be kept alive in his present condition. Two co-workers of Michael each testified that Michael had remarked to them before the accident that he would not want to continue living a vegetative-type state. The remark was made to one of the co-workers during a casual conversation around the lunch table and to the other while discussing someone else who had been severely injured. Both co-workers testified that Michael's present condition is not the type Michael was referring to in the pre-accident conversations. Respondent Pat Major admitted that Michael once told her that he would not want to be kept alive by a respirator if he were in a coma.

Conflicting testimony was presented regarding Michael's current level of physical, sensory, emotional, and cognitive functioning. At one extreme, Dr. Joseph Fischhoff, who is head of the Department of Psychiatry at Wayne State University and the chairman of the bio-ethics committee at Children's Hospital in Detroit, testified that Michael has no voluntary control over any of his limbs, nor any ability to function on a voluntary level, and therefore lacks any meaningful interaction with his environment. However, Dr. Robert Kreitsch, who is the director of the Brain Injury Rehabilitation Program at the Mary Free Bed Rehabilitation Center, testified that Michael demonstrated an ability to carry out some voluntary motor commands on his right side, including the ability to pinch and grasp, as well as the ability to recognize faces, respond emotionally, and communicate with others with head nods. According to Dr. Kreitsch, Michael seemed content with his environment and indicated "no" with a head nod when asked whether he has been in any pain or discomfort, and also when asked if there were ever any times when he felt that he did not want to go on living. Other medical experts also presented differing opinions regarding Michael's level of functioning, but generally described it as falling somewhere between that described by Drs. Fischhoff and Kreitsch. All medical experts agreed that Michael was not in a persistent vegetative state nor terminally ill.

Petitioner, several therapists from the NMNC, and several lay witnesses all described an apparent limited ability by Michael to interact with others and to respond to simple yes or no questions with head nods; their testimony varied, however, with respect to the consistency and appropriateness of the perceived interaction and responses. The trial judge personally visited and questioned Michael at the NMNC on October 14, 1992. The judge explained on the record how Michael had moved both his right arm and right leg on command, and how he had responded with appropriate head nods to a series of yes or no ques-

tions. Witnesses also testified that there are times when Michael becomes completely withdrawn and does not respond to any stimuli.

In a decision delivered from the bench on October 30, 1992, the trial court ruled that clear and convincing evidence had been presented that Michael did not want to be "kept a dependent person" and that his present condition "falls within what Michael did not want to be." Nonetheless, the court held that Michael's intentions could not be considered because they were not expressed in writing. The trial court further ruled that withdrawal of nutritive support was in Michael's best interests, but that, absent being terminally ill, a best interest standard could not be applied as a matter of law. Accordingly, the trial court denied the petition for authority to withdraw Michael's nutritive support. The trial court then proceeded to also deny respondents' petition asking that Mary Martin be removed as Michael's guardian and conservator, as the court concluded that her "decision-making process" relative to the decision to withdraw life-sustaining medical treatment was not inapproriate. Motions for reconsideration brought by both sides, including a request by respondents for specific factual findings, were thereafter denied.

I

A

This Court recently held in *In re Rosebush*, 195 Mich App 675, 681-682; 491 NW2d 633 (1992), that a competent adult patient has the right to refuse life-sustaining medical treatment as an aspect of the common-law doctrine of informed consent and that such right is not lost because of the subsequent incompetence of the patient.[1] The Court stated that where a patient lacks the

[1] As other states have recognized, cases involving treatment by artificial feeding versus other froms of life-sustaining medical procedures are treated the same. See *In re Conroy*, 98 NJ 321,

capacity to make a decision concerning medical treatment, a surrogate decision-maker may exercise the right to refuse treatment by applying either a "substituted judgment" or a "best interests" standard, whichever is appropriate. *Id.* at 688-690. We agree with these principles but expand upon them further.

Because a patient's right of self-determination is generally recognized as outweighing any countervailing state interests, where a patient currently has the requisite decision-making capacity, the expressed statements of the patient regarding medical treatment will generally control that patient's care, regardless of the consequences of the decision. *Rosebush, supra* at 681 n 2, 688. Cf. *Cruzan* v. *Director, Missouri Health Dep't*, 497 US 261, 279; 110 S Ct 2841; 111 L Ed 2d 224 (1990).

Likewise, where a patient has lost the requisite decision-making capacity, it is still the goal to effectuate the patient's right of self-determination. *In re Conroy*, 98 NJ 321, 380-381; 486 A2d 1209 (1985); *Guidelines for State Court Decision Making in Authorizing or Withholding Life-Sustaining Medical Treatment* (Williamsburg, Va: National Center for State Courts, 1991), p. 60. Accordingly, courts have generally recognized, and we agree, that where a formerly competent patient lacks the requisite capacity to make a decision regarding the withholding or withdrawal of life-sustaining medical treatment, such treatment may be withheld or withdrawn upon proof by clear and convincing evidence of the patient's previously expressed medical preference to decline the treatment un-

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372-373; 486 A2d 1209 (1985). See also *In re Drabick*, 200 Cal App 3d 185; 245 Cal Rptr 840 (1988); *In re Severns*, 425 A2d 156, 160 (Del Ch, 1980); *In re Guardianship of Browning*, 568 So2d 4, 17 (Fla, 1990); *In re Longeway*, 133 Ill2d 33, 45; 549 NE2d 292 (1989); *In re Gardner*, 534 A2d 947 (Me, 1987); *Brophy* v *New England Sinai Hosp, Inc*, 398 Mass 417; 497 NE2d 626 (1986); *In re Guardianship of Grant*, 109 Wash 2d 545; 747 P2d 445 (1987).

der the circumstances presented.[2] *In re Guardianship of Browning*, 568 So2d 4 (Fla, 1990); *In re Longeway*, 133 Ill2d 33; 549 NE2d 292 (1989); *In re Gardner*, 534 A2d 947 (Me, 1987); *In re Peter*, 108 NJ 365; 529 A2d 419, 425 (1987); *In re O'Connor*, 72 NY2d 517, 531 NE2d 607 (1988); *Conroy, supra*.

In the absence of clear and convincing evidence of the patient's actual medical preferences under the circumstances, a decision whether to withhold or withdraw consent to life-sustaining medical treatment may be exercised by a surrogate decision-maker applying the "substituted judgment" or the "best interest" standard articulated in *Rosebush*. Under the substituted judgment standard, a surrogate decision-maker may consent to the withholding or withdrawal of life-sustaining medical treatment where there is some trustworthy evidence that the patient would have refused the treatment at issue and the burdens of prolonged life outweigh the benefits. *Rosebush, supra* at 688-689. Under the best interest standard, if there is no trutsworthy evidence that a formerly competent patient

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[2] The panel in *Rosebush, supra* at 688 n 7, "summarily reject[ed]" adoption of a standard based on the presence of clear and convincing evidence of a formerly competent patient's decision, made while competent, to forego life-sustaining medical treatment under similar circumstances. However, because *Rosebush* did not involve a patient who was formerly competent, consideration of whether such a standard should be adopted as applied to a formerly competent patient was not essential to the determination of that case. Accordingly, the *Rosebush* panel's discussion of that standard is dicta and a rule of law to which Administrative Order No. 1990-6 applies was not established. *People* v *Cooke*, 194 Mich App 534, 538; 487 NW2d 497 (1992). Since we are free to do so, we disagree with the conclusion in n 7 of *Rosebush* that adoption of a rule that evidence of the clearly expressed wishes of a previously competent patient may be used in the case of a now incompetent patient would preclude termination of life support efforts for minors or others who have never been competent. One set of circumstances has nothing to do with the other. We address below the proper standards that apply in all cases.

would have declined treatment, then a surrogate decision-maker may still consent to the withholding or withdrawal of life-sustaining medical treatment if doing so would serve the patient's best interests. *Rosebush, supra* at 688-690. A nonexclusive list of factors which should be considered in making a best interest determination is set forth in *Rosebush* at 690. Although the trial court here held that a best interest standard may not be applied as a matter of law to a patient who is not terminally ill, such a rule is not required by *Rosebush*, nor do we adopt such a rule ourselves. Rather, whether a patient is or is not terminally ill would merely be considered as a factor in determining whether the withholding or withdrawal of life-sustaining medical treatment serves the patient's best interests.

It is apparent from this analysis that the trial court is to consider the various standards in the following sequence:

1. Whether there is clear and convincing evidence of the patient's previously expressed desires regarding life support under the conditions in which the court finds the patient to be.

2. If such evidence is not clear and convincing, the court may use the substituted judgment test as defined in *Rosebush*.

3. Only if the evidence in the first two categories does not yield a result may the court move on to consider a pure best interest standard. (Obviously, steps 2 and 3 also apply to minors and others who have never been competent.)

The logic of this sequential analysis is rooted in the fact that as we progress from one step to the next we are moving away from deferring to the wishes of the patient to the point where we allow others (fiduciaries, family members, ethics committees and courts) to decide whether the patient will live or die without reference to the patient's wishes. Our premise is that this should not be permitted

except as a last resort given society's reverence for life and its acknowledgment that patients have an inherent right of self-determination. Nevertheless we may not eliminate the third stage because to do so would be to hold that where the patient is incompetent, never expressed his or her preferences and the court cannot determine what the patient would do under existing circumstances, life support may never be withdrawn. That is not the current state of the law.

We also disagree with the trial court's conclusion in this case that a person's medical treatment preferences must be expressed in writing. While a writing would be preferable, it is invariably recognized by other states that other evidence tending to demonstrate a person's intent with respect to medical treatment, including oral statements, may constitute sufficient evidence of intent. *In re Guardianship of Browning, supra*; *In re O'Connor, supra*; *In re Conroy, supra*, *In re Guardianship of Ingram*, 102 Wash 2d 827; 689 P2d 1363 (1984); *Guidelines for State Court Decision Making, supra* at 80-81. Moreover, our Legislature has enacted the patient advocacy statute, MCL 700.496; MSA 27.5496, which allows a competent adult to designate a patient advocate to make medical treatment decisions, including the withholding or withdrawal of life-sustaining medical treatment. Subsection (9)(b) of that statute provides that a patient advocate shall take reasonable steps to follow the desires or instructions of a patient made while competent, "whether given *orally* or as written." We believe this statute reflects the policy of this state that evidence of a patient's medical treatment preferences need not be in writing.[8]

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[8] A nonexclusive list of factors that may be considered in evaluating the weight and probative value of other evidence of a person's medical treatment preferences include: the remoteness, consistency, and thoughtfulness of the person's prior statements or actions; the maturity or emotional state of the person at the time of the statements or acts; the specificity of prior statements, including details about the level of impaired functioning or the

As this Court observed in *Rosebush, supra* at 687, judicial involvement in a decision to withhold or withdraw life-sustaining medical treatment generally is not required where there is no disagreement among the parties directly concerned about treatment. Where, however, judicial involvement becomes necessary, the task of the trial court is to ensure that the standards established by law are followed. See *Guidelins for State Court Decision Making, supra* at 71. It is important for the trial court to make findings of fact and conclusions of law with sufficient specificity so as to allow this Court to review the trial court's determination and ascertain why the trial court made the decision it did and whether that decision was correct. See *Eyde Brothers Development Co* v *Roscommon Co Bd of Drain Comm'rs,* 161 Mich App 654, 673; 411 NW2d 814 (1987). Findings of fact made by the trial court are subject to review under the clearly erroneous standard. See *In re Cornet,* 422 Mich 247, 277-278; 373 NW2d 536 (1985).

B

When faced with a dispute concerning a decision to withhold or withdraw life-sustaining medical treatment, the first task of the trial court is to determine whether the patient has the requisite capacity to make the decision to withhold or withdraw life-sustaining medical treatment, the first task of the trial court is to determine whether the patient has the requisite capacity to make the decision in question. *In re A.C.,* 573 A2d 1235, 1247 (D.C. App.

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forms of treatment one would find tolerable; the circumstances under which prior expressions of intent were made; and the similarity between the expressed treatment preference and the current or proposed treatment. Additionally, an understanding of the patient's present medical condition, treatment, and prognosis is necessary in order to determine whether the present circumstances conform to those contemplated by the patient at the time of the prior statements or acts. See *Conroy, supra,* 486 A2d at 1230-1231; *Guidelines for State Court Decision Making, supra* at 82.

1990); *Conroy, supra,* 486 A2d at 1241. The fact that a patient has previously been adjudicated incompetent is not controlling. As other states have recognized, a patient may not be competent to make some decisions, but still have the requisite capacity to make a decision regarding medical treatment. *Conroy, supra,* 486 A2d at 1240; See also *In re Hier,* 464 NE2d 959 (Mass App, 1984); *In re Guardianship of Ingram, supra*; *Guidelines for State Court Decision Making, supra* at 54-55. Indeed, this view is embodied in this state's patient advocacy statute, MCL 700.496(13); MSA 27.5496(13), which explicitly recognizes that an incompetent patient may express a current desire not to have life-sustaining medical treatment withheld or withdrawn.

The test for determining if a person has the requisite capacity to make a decision concerning the witholding or withdrawal of life-sustaining medical treatment is whether the person, (1) has sufficient mind to reasonably understand the condition, (2) is capable of understanding the nature and effect of the treatment choices, (3) is aware of the consequences associated with those choices, and (4) is able to make an informed choice that is voluntary and not coerced. *Conroy, supra,* 486 A2d at 1241; *Guidelines for State Court Decision Making, supra* at 55-56. Special care must be taken to ensure that sufficient information has been provided to the patient to enable the patient to make an informed choice. *Id.* The proof must be clear and convincing that the patient does not have and will not regain the capability of making the decision for himself. *Conroy, supra.*

In this case, conflicting evidence was presented regarding Michael's physical and cognitive abilities. Moreover, while some witnesses questioned Michael's ability to understand, communicate and interact with others, several other witnesses testified that he has demonstrated an ability to understand and respond appropriately to certain questions, although there was some disagreement regarding his capacity and level of understanding and the con-

sistency and appropriateness of his responses. The record does not indicate that there was ever any concerted effort to specifically inform Michael of the nature and purpose of the proceedings or to inquire of him specifically what his treatment preferences might be.

Regarding the issue of Michael's decision-making capacity, the trial court simply stated that Michael was not competent to decide. Unfortunately, the trial court's generalized finding of incompetency does not enable us to determine whether it properly resolved the issue of Michael's capacity to decide his own treatment. The trial court failed to issue specific findings reflecting consideration of the various factors for assessing a person's capacity to decide questions of medical treatment and we cannot determine whether these factors were actually considered and, if so, how they were resolved.

As this Court explained in *Nipcon* v. *Nipcon*, 9 Mich App 373, 377-378; 157 NW2d 464 (1968):

> An appellate court's primary function in regard to fact finding is review of the trial court's record and determination whether that record supports the trial court's findings. It is not the function of an appellate court to decide disputed questions of fact in the first instance and then choose between affirmance or reversal by testing its factual conclusion against that which the trial court might have . . . reached.

We will not speculate as to how the trial court arrived at its generalized finding of incompetency or what such finding entails. Therefore, we find it necessary to remand for further and more specific findings of fact and conclusions of law on the issue of Michael's decision-making capacity consistent with the legal principles discussed herein. Moreover, given the importance of this issue and to ensure a proper basis for decision, the parties shall be permitted the opportunity to present additional evidence specifically addressing the various factors applica-

ble to a determination of Michael's decision-making capacity. The parties may also request, or the trial court on its own motion may order, additional medical and psychological testing of Michael. Consideration of any newly presented evidence shall be reflected in the trial court's new findings of fact and conclusions of law.

We also find inadequate the trial court's findings of fact as they relate to its rulings on the issues of Michael's medical treatment preferences and his best interests. Indeed, despite the wide range of testimony, the trial court issued no findings whatsoever detailing Michael's present condition or his present level of physical, sensory, emotional, and cognitive functioning. Absent any indication of what the trial court believed Michael's present condition and level of functioning to be, or what types of evidence it looked to as establishing clear and convincing evidence of his medical treatment preferences under the circumstances, we simply are unable to determine whether the trial court correctly decided these matters. Accordingly, we direct the trial court to also reevaluate these matters in light of the legal principles discussed herein and to issue specific findings of fact and conclusions of law so as to enable this Court to ascertain the basis for any decision reached and whether that decision was correct.[4]

II

We agree that the trial court erred when it denied respondents' petition asking that Mary Martin be removed as Michael's guardian and conservator without having

[4] We recognize that consideration of a patient's prior medical treatment preferences or an application of the substituted judgment or best interest standards is neither necessary nor proper until it has first been determined that the patient lacks the requisite decision-making capacity, a determination which we are unable to make at the present time. Our purpose here in remanding for additional findings of fact and conclusions of law on these issues is to ensure the expedient resolution of this case in the event consideration of these issues becomes necessary.

*held a hearing for the purpose of inquiring into her suit*ability as guardian and conservator. As the court in *Conroy, supra,* 486 A2d at 1241, stated:

> [T]he court should determine whether the guardian is a suitable person to represent the patient with respect to the medical decision in question. Such a determination necessitates an inquiry into the guardian's knowledge of the patient and motivations or possible conflicts of interest.

Accordingly, as part of the proceedings on remand, the trial court shall also conduct a hearing on respondents' petition for removal. The evidence which respondents attempted to offer below concerning the issues of possible bias, prejudice, conflict of interest, or improper motive on the part of petitioner, but which was not admitted, shall be considered at the hearing. We make no comment on the admissibility of any specific evidence.

Regarding respondents' claim that they are entitled to a jury determination of their petition for removal, we find that the authority cited by respondents does not support their claim.[5] We note, however, that MCL 600.857(1); MSA 27A.857(1) provides for the right to a jury determination in probate court of a particular issue of fact if a party would have had a right to demand a jury to determine that issue of fact in the circuit court upon a de novo appeal from a probate proceeding before January 1, 1971. In *In re Bristol,* 199 Mich 453, 456; 165 NW 819 (1917), which involved an appeal from a circuit court proceeding on appeal from the probate court, our Su-

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[5] Moreover, respondents' suggestion that they have a constitutional right to a jury trial is incorrect. Because the constitutional provisions relating to the right to a jury trial, US Const, Am 7; Const 1963, art I, § 14, extend only to cases where a right to a jury trial existed prior to the adoption of the constitutions, and because probate courts previously proceeded without a jury, there is no constitutional right to a jury trial in probate court. See *Conservation Dept* v *Brown,* 335 Mich 343, 346; 55 NW2d 859 (1952); *Ward* v *Booth,* 197 F2d 963, 966 (CA 9, 1952); 50 CJS, Juries, § 13, p 727.

preme Court stated that a proceeding involving considerations as to the propriety of a guardian's actions is an equitable one for the court to decide, but that "[m]atters of fact which are disputed may be submitted on proper issues to a jury to determine definitely such specific facts as will, when found, aid the court in determining questions which belong to its equitable discretion."

Respondents here do not address the applicability of MCL 600.857(1); MSA 27A.857(1), nor do they identify any "specific facts" in dispute. On remand, any properly preserved request by respondents for a jury determination in connection with their petition for removal shall be resolved in accordance with MCL 600.857(1); MSA 27A.857(1).[6]

III

It was sugested below that respondents are not proper participants in the proceeding to determine whether Michael's nutritive support should be withdrawn. We disagree. In *Rosebush, supra* at 687, this Court stated that a party "directly concerned" is a proper participant in a judicial proceeding involving disagreement over medical treatment decisions. In *In re Jobes*, 108 NJ 394, 415, 417; 529 A2d 434 (1987), it was observed that a patient's parent or sibling normally will be considered a proper participant in such a proceeding because such persons invariably are familiar with the patient's medical attitudes and intentions. In this case, we are satisfied that respondents have standing to participate in these proceedings.

IV

Respondents also argue that the trial court erred in denying their request for attorneys' fees to be charged

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[6] Although petitioner argues that any entitlement respondents might have to a jury determination was not properly preserved, see MCR 5.508, we do not address that issue because it was not raised and addressed below. *Hunters Pointe Partners Ltd Partnership* v *United States Fidelity & Guaranty Co*, 177 Mich App 745, 750-751; 442 NW2d 778 (1989).

against Michael's estate. Petitioner argues that the trial court properly denied the request because a pretrial order reflects an agreement to limit respondents' recovery of attorneys' fees to $20,000, which they already received.

While the pretrial order reflects that petitioner, as guardian and conservator for Michael's estate, agreed to pay reasonable attorneys' fees incurred by respondents up to $20,000, it does not reflect that respondents agreed to forego any claim they might have to recover additional fees. Hence, we do not view the agreement as restricting the trial court's discretion to award additional attorneys' fees to the extent respondents would be entitled to recover such fees. We do not interpret the agreement that no fees in excess of $20,000 will be paid without advance approval of the court to mean that the *services* must be approved before they are performed. It is only payment that must be approved prior to the disbursement of funds. It would be inequitable for a court to allow extensive hearings to take place and then deny payment on the basis that the attorneys who appeared at the hearing did not obtain a prior order to prepare for and argue the case.

Generally, attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, or judicial exception. *Brooks* v. *Rose*, 191 Mich App 565, 574-575; 478 NW2d 731 (1991).

In *Becht* v *Miller*, 279 Mich 629, 638; 273 NW 294 (1937), our Supreme Court held that attorneys' fees incurred by a party not acting as a fiduciary may properly be charged against a decedent's estate under certain circumstances:

> [A]s a general proposition it may be stated that before such an item may be charged against the estate it must be shown that the services rendered were beneficial to the estate as a whole rather than to an individual or group of individuals interested therein.

This rule has been extended to guardianship cases to allow the estate of a ward to be charged with reasonable attorneys' fees incurred by a nonfiduciary where the ward's estate is benefitted. *In re Valentino Estate*, 128 Mich App 87, 96; 339 NW2d 698 (1983).

In this case, conflicting evidence exists regarding Michael's wishes and physical and mental condition. Under the circumstances, we believe that Michael can be said to derive a benefit from a proceeding, such as this, designed to ensure that his present capacity to decide his own medical treatment is fully explored and, in the event it is determined that he lacks the requisite decision-making capacity, that his medical treatment preferences or best interests are likewise fully and adequately considered and protected. This is particularly so where the exercise of an erroneous determination will result in the termination of life. We believe, therefore, that the rationale of *Becht* and *In re Valentino* is applicable to the case at hand and allows Michael's estate to be charged with reasonable attorneys' fees incurred by respondents in their efforts to ensure that Michael's condition, intentions and best interests are fully considered and protected. Were we to hold otherwise we would be saying that attorneys who advocate the termination of Michael's life may be paid for all their reasonable services out of his estate but those who advocate keeping him alive may not.

Accordingly, we hold that reasonable attorneys' fees incurred by respondents may be charged against Michael's estate in an amount to be determined following a hearing on the question of reasonableness. *In re Humphrey Estate*, 141 Mich App 412, 439; 367 NW2d 873 (1985); *In re L'Esperance Estate*, 131 Mich App 496, 501; 346 NW2d 578 (1984).

V

Respondents also challenge a February 3, 1993, injunction issued by the trial court enjoining them from interfering in the medical treatment of Michael and assessing

costs in the amount of $675. The injunction was issued because of a letter sent by respondents' attorney to Butterworth Hospital on December 24, 1992.[7] Injunctive relief is an extraordinary remedy which is granted only when (1) justice so requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury. *Charter Twp* v *Lazechko*, 197 Mich App 681, 682; —— NW2d —— (1992). We find that the trial court abused its discretion in issuing the injunction and we order it dissolved. Under the circumstances, we do not believe that respondents acted improperly in sending the letter to the hospital. Moreover, there was no showing that the transmission of the letter affected petitioner's dealings with the hospital as Michael's guardian, or that some type of irreparable injury was likely or imminent.

Reversed and remanded for further proceedings consistent with this opinion. Proceedings on remand shall be held within fifty-six days of the release of this opinion and the trial court shall forward its findings of fact and conclusions of law to this Court within twenty-eight days of the conclusion of the procedeings. The parties may submit supplemental briefs within twenty-eight days of receipt of the trial court's findings of fact and conclusions of law. We retain jurisdiction.

/s/ John H. Shepherd

/s/ Myron H. Wahls

/s/ Mark J. Cavanagh

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[7] The letter was sent after respondent Major unexpectedly discovered that Michael had been transferred to the hospital and then found him there in a "depleted" condition with his feeding tube removed. The letter advised the hospital that petitioner, as Michael's guardian, was without court authorization to order the withdrawal of reasonable medical treatment or life support.

APPENDIX F

Judge Greig Order of Nov. 12, 1992

STATE OF MICHIGAN
COUNTY OF ALLEGAN
PROBATE COURT

File No. 87-44115-CG

IN THE MATTER OF: MICHAEL MARTIN,
a Legally Incapacitated Person

ORDER DENYING AUTHORITY TO DISCONTINUE MEDICAL TREATMENT; ORDER DENYING PETITION FOR SUCCESSOR GUARDIAN/CONSERVATOR; ORDER RE: G.A.L. AUTHORITY AND ORDER CLARIFYING GUARDIAN AUTHORITY

At a session of said Court held at the City of Allegan in said County on the 30th of October, 1992.

PRESIDING: HON. GEORGE A. GREIG,
PROBATE JUDGE

The Court having on October 13, 14, 15, 16, 17, 29 and 30, 1992, heard the testimony and arguments of the parties and counsel, and having considered the evidence duly admitted; and the Court having given it's opinions and findings upon the record in open court, which is incorporated herein by reference thereto as if set forth herein in its entirety; and the court being fully informed in the premise.

IT IS ORDERED and ADJUDGED that the petition of Guardian for confirmation of authority to discontinue medical treatment by withdrawal of artificial means of

life support be and is hereby denied for reasons more fully set forth upon the record.

IT IS FURTHER ORDERED and ADJUDGED that the petition of Leeta M. Martin and Patricia Major for removal of Guardian and Conservator and for appointment of Successor Guardian and Conservator of Legally Incapacitated Adult, be and is hereby denied for reasons more fully set forth upon the record and in accord with this Court's October 6, 1992, pretrial order and findings.

IT IS FURTHER ORDERED that Irving Stahl, Guardian Ad Litem, shall continue on as Guardian Ad Litem, for any and all post-judgment proceedings, and is hereby specifically authorized to initiate an appeal or any other post-judgment proceedings that the guardian ad litem, in the exercise of his best discretion and in the best interest of his wards, shall deem appropriate, and the estate shall be responsible for the reasonable costs thereof.

IT IS FURTHER ORDERED that the previous alleged restrictions, understandings and agreements discussed upon the record at a hearing in this Court on October 14, 1988, but never incorporated into any written court order issued by the court following said October 14, 1988 hearing on a petition for the appointment of a successor guardian, be and are hereby determined and clarified to be of no force and effect and the guardian/conservator has no restrictions or obligations therefrom.

Dated: November 12, 1992

/s/ George A. Greig
HON. GEORGE A. GREIG
Probate Judge

APPENDIX G

STATE OF MICHIGAN
IN THE PROBATE COURT
FOR THE COUNTY OF ALLEGAN

File No. 44115-CG

IN THE MATTERS OF
MICHAEL MARTIN,
A Legally Incapacitated Person

Partial Transcript
Judge's Findings
Hearing on Petition to Allow Guardian Authority
to Withdraw Life Support

Before the HON. GEORGE A. GREIG,
Probate/Juvenile Judge (P14362)

Allegan, Michigan—Friday, October 30, 1992

Allegan, Michigan

Friday, October 30, 1992—at 3:01 p.m.

THE COURT: Let the record show we've taken a short afternoon break. It's about three o'clock now and all the parties and counsel are back in the courtroom; and all the evidence, testimony, arguments that are going to be presented or allowed to be presented before the Court on the question before the Court have been submitted; and it is at this time that the Court is at a position to make a decision based on what's before the Court.

I think it's first important to determine and clarify

what the law is within the State of Michigan as this Court understands it and would determine it to be for the purposes of this hearing and this decision.

As we all know the Michigan Legislature is responsible for enacting the substantive law which the Court must follow. The Michigan Appellate Court's decisions must also be followed by the trial courts; and this Court, the Allegan County Probate Court is a trial court in the State of Michigan, of record.

And both the legislative substantive law and the Appellate Court decision, at least in this case the Rosebush decision here in the State of Michigan, a recent decision, provides that a competent or incompetent person or patient has the right to refuse or discontinue unwanted treatment.

Now not everybody may agree with the Legislature or the Appellate Courts and there's certainly a lot of room for arguments that were also held by the Legislature before enacting such statutes and by the court, the Appellate Courts, because it takes trial court to make some decisions that you're appealing from. So there's certainly —it's not everybody the same opinion; but it is what the law is that this Court is required to follow.

Again in Michigan with respect to guardianship matters the Court never makes the decision for the guardian of this nature.

Preferably, obviously, the decision should be made by the person or patient themselves if competent; or if incompetent, again, in this State, it would be made by a surrogate decision maker which could take several different forms. It could be in the form of the family, which is probably the most common form of decision making by a surrogate for an incompetent patient.

By incompetent I'm not saying that that is a court determined incompetent but it may be unconscious patient, one that's so under the injuries that they are not in a position to make an informed consent, as we are all familiar with and that decisions are made by the family.

And I think we all know that once families at least all agree that it is quite common and an every day, in this Court's opinion, routine decisions are made of that nature where treatment is either discontinued or never started in the first place.

It could also be in the form—a surrogate decision maker in the form of a court appointed guardian, as we have in this particular case; and I want it clarified that the Court by appointing a guardian does not by the act of appointment make a decision for the guardian of what she or he is not doing unless it's spelled out or limited—her powers are limited in this case which they're not by the order appointing or her letters of guardianship. There are no limitation other than that after May of 1988—I'm not sure if it was May, but 1988, when we imposed some limitations as to who could—well, see the records among other things. That the appointment merely empowers the guardian to be able to make her own decisions in the best interest of, in this case, her incompetent ward.

I also think we ought to clarify right up front that although it is the guardian-ad-litem's duties and responsibilities to make sure the incompetent individual's—in this case by way of being a minor, the children; and again, as another precaution on behalf of the ward, himself, in this case, making sure that their voices or positions, if ascertainable, can be heard.

The fact or the argument that what might be in the best interest of the minor children here if the father—what problems it might solve for the children, that—if their father were no longer living would not be a factor, in this Court's opinion to deciding whether or not the father should live or not.

I don't think and it's not this Court's position, nor should it be a guardian's position, of someone else's death solving someone else's problem. It should not be a factor and it is not considered a factor by this Court nor do I believe it was considered a factor by the guardian.

It is not this Court's finding that the guardian-ad-litem in this case had any conflict of interest. There was a possibility that a conflict of interest could have arisen. It was discussed early on. It was discussed by—this Court had a number of conference phone calls with all counsel at a number of times during the course of pre-trial preparations up to the beginning of this trial so that everyone could be—have input at the same time and also know what input was being put in by the others for preliminary decisions leading up to the trial of this matter; and that was raised and it did not, in this Court's opinion, come to a point where there was a conflict. If it had been the Court would have resolved the conflict and/or, I'm sure, in this case that Mr. Stahl would have advised the Court he had reached a point where there was, in fact, a conflict. That did not happen. There was not a conflict in this Court's opinion.

There's a wealth of testimony in this case. It's all over the board as you've all argued of where everybody's coming from, from their viewpoint and how they view life or death.

We have the testimony, for the most part, from those who see Michael on a short examination, a short basis of an hour, an hour and a half. Those persons seem to fall within one category—excuse me—of being more—I don't want to say objective—they're not swayed by perceived personalities on the part of the patient or any long-term contacts of acquaintances between the patient and examiner that the hands on people, especially at the Center in Howell, have developed. And it is the short examination, short acquaintance ship professional, who based on what they see, for the most part conclude that Michael is somewhere above a persistent vegetative state, which is considered one and two, so somewhere just above a two.

Now this ranges all the way up to—and I believe testimony was five—and I believe one even got to as high as a six on a scale of one to eight: eight being normal and one being alive only. Quite a variance.

The Court, as you know, had an opportunity to be alone with Mr. Martin for a short period of time in his room; and for a short period of time with the therapist on the machine, the device, in the therapy room with Michael; had a chance to see both some responses and what's been described as a shut down.

There was great objection by one of the witnesses here in this courtroom to the fact that a pet might be a derogatory term applied to Michael, that he was a pet of the facility; assuming for the moment that it was meant in an animal type pet as opposed to a favorite.

I being that up because there has been testimony as to whether and what is the ability of Michael to learn, what is his current memory. He's been described as someone who is locked in the past; that he has his memories of the past of what it was like before the accident when it was there and locked in that time as well. In part it describes, in this Court's opinion, why he doesn't recognize his children today if they've changed over six years and that his memory of the moment is just that, the memory of the moment; and that he is being trained—and I don't want to be—to in any way put down somebody here, but that the indications could well be that he is, in fact, in a type of training program in a much difference sense is that he responds to—he learns to respond to certain comands, which I think has been shown to a certain degree.

The terms have been used throughout that he didn't perforn today. He didn't perform in front of strangers. He has to perform in front of the people he knows best. And I hesitate to use the word trainers, but it is the therapist then that he is performing for the best.

The Court already has ruled that Michael was not and is not competent in his own right to make any informed decision as to whether or not the tube should be removed. The Court gave it's opinion on that last Saturday morning —or two weeks ago Saturday morning.

I wish to reiterate that it's still this Court's opinion, even though it might be argued that he should have some

input into that decision directly as to what—what he desires. I am not, by that ruling, discounting that a person may not indicate in some other form competent or incompetent a change of mind if that's the situation as has been argued.

For Michigan does provide, at least by statutory provisions that, in this Court's opinion, an incompetent person can change their mind of a decision they made while they were competent.

We've gone through a lot of the statements that are attributable to Michael prior to the accident. I think we all know what those statements are they've been—I believe everybody has stated all of them, if not most of them, in the course of the final arguments, the record's replete with what those statements were, the number of statements, the different times of the statements and the different people the statements were made to.

The so-called substituted judgment standard, meaning that if—if there are—was a position stated by a person, in this case Michael, while he was competent, if it can be determined by clear and convincing, in this case, evidence, of what his desires were that, in this case, the guardian should follow them or can follow them.

I make two findings here with respect to the substituted judgment standard one factual and one legal:

Factually, based on all of the testimony, I believe that Michael's statements made prior to the accident were clear and convincing of his intent not to be kept a dependent person. And all of the attributes that have been discussed and the number of arguments and by the number of different doctors as to how dependent he is, certainly falls within what Michael did not want to be.

From a legal standpoint, however, with the state of the law in Michigan as this Court believes it is at this time, is that for—because of the fact we have provisions requiring such statements and desires to be in writing, that it is the Legislative intent that such serious, important decisions of life and death should be in writing and not be considered verbal.

So while the Court believes that the substituted judgment standard has been met by clear and convincing evidence, it also believes that the law of Michigan presently requires that such, in this case statements made before becoming incompetent must be in writing and in the written form as Michigan requires.

And that applies to where you were previously competent at one time and—

And, of course, this is not a case that he was never competent.

The Court, however, cannot fault, from the substituted judgment standard, cannot fault the guardian in any decision making process in this respect as this is the legal interpretation and application to the clear and convincing factual findings that were made by the guardian as well.

Under the circumstances that the Court finds itself in by that decision, again it's necessary to consider the best interest standard. And again, the Court, based on all of the reasons that have been set forth here and testified to at great length and spelled out in the Rosebush case here; the list of factors which are not necessarily and are said to be non-exclusive list of factors, but they are at least the ones that have been spelled out, have all been gone through as to what the guardian position was in each one of the facts, that a guardian or a surrogate decision maker should have to go through for an incompetent person; and looking it from Michael's standpoint, again find by clear and convincing evidence that all the factors were appropriately considered and that the guardian's decision making process was appropriate and was proper.

I don't think it's necessary to go through each and every witness's testimony and apply that to each and every standard. Suffice it to say that the arguments that have been made in support the Court adopts as being factual and being a reasonable interpretation of the facts and the circumstances which Michael finds himself in and it's based on Michael's personal history both before and after the accident.

And this Court's findings that those persons who are working with him on a daily basis, the therapist, and they're—and they're good, boy are they good—that I have to agree that they deal in a lot of faith and hope and they're looking at what they're doing—they do look and hope to see some tangible improvement; and there's been some.

And if one reads these reports which I've read through and you read the—the notes—if one didn't have any idea what this case was about or had any opportunity to hear the witnesses and have them cross-examine, one would think one was having normal conversations in a give and take arguments and telling jokes, the dumb blond jokes, the laughter, that these are all in the eyes of those who read it and read those terms in their standard meeting—meaning would think that there's a regular give and take conversation and a regular laughter that is being observed and—and happening with Michael. That is not the case.

But it is terminology that those who help and those who do such a great job working with the severely brain-injured persons find, at least in this Court's opinion based on this case, find helpful in their dealing on a day to day basis with Michael.

Again, however, it's a question of a legal interpretation of the facts to the law; and that is the hard part as to where the law is.

The medical profession doesn't even know where it is in these questions, that's obvious when a doctor even has to ask his ethisist whether or not he can even ask a patient should he—does he have a desire to live or die before he even thinks it's appropriate to even ask a patient. The medical profession's got a long way to go on resolving how they're going to handle these cases.

The legal community has a way to go.

While the trial court gets to see all of the emotions, the facial expressions, the intonations of the witness during the course of a hearing, the Appellate Court can look

at this in a cold, calculated method of manner of reading a transcript and reading words. They don't have to look into the faces of those that are asking the questions and asking for the decisions, nor do they have to work with Michael.

And I might add, along those lines, that we all had an opportunity to see the mannerisms of the therapist and the good doctors that work on a daily basis in the Center there. I think I made the comment, and it's still true in this Court's opinion, that when talking to patients and when talking about specific conversations whether re-enacting their conversations or questions, they call talk in terms of kindergarten teachers in the sense they're very animated.

I don't like—again a big, broad smile and a big fan fare—and like babies—when you open your mouth to feed a baby.

Michael will smile back when smiled to and a big hello.

It is this Court's opinion that is a big factor in the observations of his therapist, who are the basis for the most testimony that would imply Michael is a competent individual in his own individual right to make his own decisions, which the Court did not find was the case.

I read the Rosebush decision. I reread the Rosebush decision. I see that Conroy citation at the end here where argued that is part of Conroy's—included in part of it, it has the best interest standard. They summarize it, they take the quote out of the Grant case, all the little footnoes that the case comes with by the Court of Appeals. The arguments that are made that is this new ground that we're opening up here?

Here we had a obviously competent made before the accident who made some statements and then now is incompetent to reiterate them; and I've ruled that the substituted judgment standard in Michigan would require they be in writing; so then we go to the best interest standard that we have a man who is now incompetent

who can't make that decision so we have to use what's in the best interest for him and what does that require among those things that were reiterated here.

The Court does believe that Michigan requires that they'll be—that there be some terminal illness, which has not been shown in this case.

There's been some testimony that there has been or it could be considered from a technical, medical standpoint, that if you withdrew the tubes that he would not live so that he's terminal in that sense; however, it is the case law, as this Court sees it, not only throughout the nation, but locally here, that—that that in this Court's opinion did not amount terminal illness in and of itself; and that one is required.

Now again, this is a question of legal interpretation, this is something that has come down after this has begun. It does adopt standards that other states have used and that—and that were considered by the bio-ethics committee as well.

I cannot fault the guardian in any of your decision making process in this regard as well for I feel that you have reasonably interpreted and found the factual situation as has been presented; and again, it's an application of the facts through your best interpretation and advice as to what the law is or should be as best is interpreted by your advisors. Accordingly, there would be no reason to consider any change of guardian or any reason to put any restrictions or reservations on the guardian's authority.

The fact that the medical profession may require, in their opinion, total agreement by the family, it is not a legal requirement on the guardian.

I believe the guardian fully explained her reasoning behind the 19—January, 1992, Butterworth admission and her positions at that time with respect to notifying the family, or more clearly, not notifying the family or not if she didn't have to include the family in those decisions.

I don't know what the relationship between the family was before the accident. It surely went downhill after

the accident when mother walks in and in so many words: Why weren't you driving? Why wasn't it you, Mrs. Martin: Why is it my son? while you're in the hospital with a trachea on your throat.

A guardian's duties are to the day in and day out decision making while they can consult as many people as they wish, while they can consult family if they desire and take into consideration all of the positions of all of the interested parties, the final decision is the guardians.

I've often said to people when I appoint them guardians: You're the boss. When it comes down to settling any arguments, you're the boss.

Who can see Michael? You're the boss. What his treatment is? You're the boss.

If somebody disagrees with how you exercise your discretion that's those—the duty is on those people to come into the Court to review that, which was done in this case.

It will be the—the Court will specifically confirm your continuation as the guardian with no restrictions

Is there anything else that needs to be included in the order at this time then?

Any clarification?

MR. HESS: I can't think of anything at this time, your Honor.

MR. BRODER: Nor can I.

MR. HESS: I'd like to confer with Mr. Broder for a minute.

THE COURT: All right. Do you want to take a short break?

MR. HESS: Yes, sir.

THE COURT: All right, we'll take a short break.

(Proceedings recessed at 3:43 p.m.)

(Proceedings reconvened at 3:47 p.m.)

THE COURT: Let the record show we took a short break.

As I walked out of here I thought, myself, and I did confuse everyone at the very end there. I had two sepa-

rate thoughts going and it sounded like one was connected to the other with respect to that the guardian continues with no resrictions. I meant that as a separate thought.

The first thought was that the—and ruling is that although the reasoning was correct and the facts are there, the law does not permit the guardian, in this Court's opinion, under the law as I interpret it that—to pull the tubes at this time; that, however, I'm not removing the guardian as such.

I believe I have—when I say I could not find any fault with her and her reasoning because it was a legal interpretation of the facts that we found to be true to the law that I'm continuing you on as guardian with no restrictions on your authority that you would normally have.

MR. BRODER: Understood, your Honor.

THE COURT: Okay.

That there was an agreement to make a special record on some matters that the Court excluded and it's been agreed that we'll come back on a different date to do that.

It does not affect the ruling of this Court in any fashion.

It's—somebody wants to make a particular order or you want the Court to make the order today, the written order in conformance with this Court's opinion? Does anyone want to do it or do you want me to do it?

MR. BRODER: I think you ought to do it, your Honor.

MR. HESS: Yes, Yes.

THE COURT: I was afraid you'd say that.

Okay, I'll draw an order, a written order.

MR. HESS: It may be possible on the side record that Mr. Broder and I can work out the details of that without having to reappear on that we'll work towards that end if possible.

THE COURT: All right, whatever you wish to do that's fine with the Court.

All right, then if nothing further we stand adjourned.

(Proceedings adjourned at 3:49 p.m.)

Supreme Court, U.S.
FILED
DEC 26 1995
CLERK

No. 95-821

In The

Supreme Court of the United States

October Term, 1995

MARY MARTIN, Guardian of Michael Martin,

Petitioner,

v.

PATRICIA MAJOR and LEETA MARTIN,

Respondents.

Petition For Writ Of Certiorari
To The Michigan Supreme Court

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Michael Martin lives in a nursing home where he appears to be content with his life. All parties and courts agree that he is not terminally ill, not in a comatose or persistent vegetative state, and not in pain. He receives food and water through a feeding tube. Petitioner, Martin's wife and legal guardian, sought court permission to authorize the feeding tube removal. The Michigan Supreme Court held that the common law doctrine of informed consent allows petitioner to authorize the feeding tube removal if the evidence clearly and convincingly shows that Martin, while competent, issued directives embracing the nature and status of his current condition. After evaluating the testimony, the Court ruled that petitioner's uncorroborated testimony concerning his previous statements did not rise to the level of clear and convincing evidence.

Petitioner seeks review of the Michigan Supreme Court decision that Martin should be allowed to continue to live, claiming the decision is an "extreme response" to those cases which have confronted the right to withdraw medical treatment. Respondents, Martin's sister and mother, oppose granting a Writ of Certiorari because Michigan's decision is consistent with those of other courts including this Court, and because the petitioner seeks an extreme result – the removal of the feeding tube of a person who appears content with his present condition and surroundings, who is expressing a current desire to live, and who is not in great pain, terminally ill, or in a persistent vegetative or comatose state. Had the Court held for the petitioner, *Martin* would have been the first

QUESTIONS PRESENTED – Continued

appellate case nationwide authorizing withdrawal of life supports from an incompetent person who was neither in a persistent vegetative state nor terminally ill. The Michigan Supreme Court was unwilling to cross that threshold on the facts of this case. Two questions are presented:

> (1) Whether a state court violates a person's fundamental Fourteenth Amendment liberty interests by denying a guardian's petition to withdraw a feeding tube and terminate the person's life, where the court recognizes the common law right of informed consent, acknowledges that the person is not in a comatose or persistent vegetative state, not terminally ill, and not in pain, and the court rules that the guardian's uncorroborated statements concerning the person's purported wish to have his feeding tube withdrawn because of his present medical condition do not meet the state's clear and convincing evidence standard.

> (2) Whether a state court violates a person's fundamental liberty interests by failing to hold that a guardian has been appointed as a "surrogate" to make treatment decisions for the person, where the guardian has failed to raise the issue in the state courts, and where the evidence, if evaluated, would be substantially weaker than the evidence which the court evaluated in determining that the guardian had failed to prove by clear and convincing evidence that the person would want his feeding tube withdrawn in his present medical condition.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, Patricia Major and Leeta Martin, Michael Martin's sister and mother, ask this Court to deny a Writ of Certiorari to review the judgment and opinion of the Michigan Supreme Court in this case for reasons stated below.

JURISDICTION

Respondents contest this Court's jurisdiction as to petitioner's Issue I because the Michigan Supreme Court decision was made on the basis of Michigan's recognition of the common law doctrine of informed consent, and because it properly determined on the facts that petitioner had failed to present clear and convincing evidence of what Michael Martin's wishes were regarding the withdrawal of life support equipment in his present medical condition. Respondents contest this Court's jurisdiction as to petitioner's Issue II for the reasons stated above, and because petitioner failed to raise and argue this issue in the courts below, SUP. CT. R. 14.1(h).

COUNTERSTATEMENT

Respondent responds to the numbered paragraphs in petitioner's petition as follows:

1. The Michigan Supreme Court, in considering the central issue in this case – the factual content and sufficiency of Michael Martin's previously stated desires – prefaced its discussion by observing that:

> [O]ur review of the record reveals that virtually all the witnesses agreed that Mr. Martin is not in a vegetative state and is not suffering from the type of incapacitation referenced in his expression of a desire not to continue life-sustaining

medical treatment. *In re Martin*, 450 Mich. 204, 229, ___ N.W.2d ___ (1995).

The Michigan Court of Appeals decision in this case, *In re Martin*, 205 Mich. App. 96, 99, 517 N.W.2d 749 (1994) observed that "Michael remains conscious, he has some awareness of his surroundings, and he can communicate to some extent through head nods."

The trial court, in its post-remand ruling from the bench, observed that Martin:

> [I]s not in a persistent vegetative state, nor is he terminally ill in any common sense of the word. Terminal, obviously, if they pull the tube, – but no, he is not terminally – that he has some disease at the moment that . . . would be medically said that he was going to die. Right now he is just prone to infections, obviously, but he is expected to have a normal life expectancy. [Probate Court Vol. 7, post remand, p. 115; included in Appellee's [now Appellant's] Appendix to her brief on appeal to the Michigan Supreme Court, Vol. II, p. 556b.]

The trial judge's own direct observations of Michael support that holding.[1] (T92. Vol. VIII pp. 12-16) (Mich R pp. 98a-102a).

Dr. Kreitsch, a certified physiatrist and director of the brain injury section of the Mary Free Bed Facility in Grand Rapids, MI (T92. Vol. IV pp. 155-158) testified that, using the general Rancho Los Amigos Scale of Cognitive Awareness for people who have brain injuries, Martin's behavior placed him at Level Five with aspects of Level

---

[1] Judge Greig discussed his visit with Martin the previous day. He reported that Martin appropriately communicated his need for a guardian, his specific job at Godwin School, that he had been a member of a pit crew at a local race track, that he could move his right, but not his left side, and did so on command.

Six out of eight levels – Level One being totally comatose and unresponsive and Level Eight being functional. According to Dr. Kreitsch, individuals in Level Five are "pleasant and cooperative but disoriented." (T92. Vol. IV pp. 173-176; T93 Vol. 3 p. 89). Dr. Kreitsch further stated that Martin cooperated to the limit of his ability by showing affect, often smiling and giving yes and no responses by head nods to verbal questions. Martin indicated that he was having no pain in general and could not recall having had much pain recently. Martin seemed "pleasant and attentive." Martin indicated that he could watch TV and follow some shows. "He brightened up with a large grin when asked if he liked cartoons." (Mich R pp. 32a-38a; T92. Vol. IV pp. 162-176).

Martin's condition was not so easily tolerated by his guardian, who testified:

> I think that taking a person, such as Mike, since he himself was a private person . . . , and displaying him in a public atmosphere, I think, was a degrading area to part of his life.
>
> I mean, if it wasn't bad enough that at Halloween they dressed him up as an M&M – . . . and normal every day people see someone that is severely impaired, they are stared at, they are looked at, children don't understand, they sit and make comments, and that has got to be very degrading. I would not want to be in a position like that to be out in a public place and I don't think that I would want that for Mike.
>
> And I think going to a Tiger Stadium where a lot of people take their children Mike and others from the facility probably were degraded more than got enjoyment out of – because I don't think they understood what they were even doing there, whether they even understood that it was a ball game. . . .

> I've gone in where Mike has been in the TV room with others from the facility. To me that wouldn't be degrading because he's with, I guess you'd have to say others that are in the same situation as him, but they're not out on display in a public way; and I think to publicly take these people out to bowling alleys and things like that I think is wrong. (T93. Vol. II; p. 78-79).

Chief Justice William Rehnquist, in this Court's *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 286 (1989) decision, observed that:

> Close family members may have a strong feeling – a feeling not at all ignoble or unworthy, but not entirely disinterested, either – that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading.

Elements of that concern are present here, as shown by the guardian's testimony quoted above. There is little wonder that the community of people with disabilities is concerned about the potential impact that a case such as this could have if, indeed, third parties are allowed to decide whether to allow or withdraw life supporting medical equipment without the requirement of a clearly and convincingly expressed previous intent.[2]

---

[2] Two amicus briefs were submitted to the Michigan Supreme Court supporting the respondents herein. Michigan Protection and Advocacy Service, Inc., a federally funded and chartered organization with the specific mission of protecting the rights of people with disabilities submitted a brief for itself, American Disabled Assistant Programs Today (ADAPT), the Association for Community Advocacy, the ARC of Michigan, the Autism Society of Michigan, the Disability Rights Bar Association, the Disability Network, and United Cerebral Palsy of Michigan. The National Legal Center for the Medically

2. Petitioner's assertion that numerous constitutional issues were raised below is true. However, it is important to note that it was the respondents who raised the majority of those issues. Of even greater importance, petitioner never raised the constitutional claim now stated as her Issue II, choosing instead to rest upon her authority as a guardian under Michigan guardianship law.

The petitioner refers to the appointment of a Guardian ad Litem [GAL] in the courts below. The fact is that the person so appointed acted as the GAL for both Martin *and* his minor children. The fundamental injustice created thereby is shown in the following portion of the GAL's closing argument to the trial court at the remand hearing:

> I don't think there's any question that Michael Martin can never again be a functioning, effective father, or for that matter, person. So for that reason, as I said in my report, my joint assessment of what is in the best interest of Michael Martin's two minor children for whom I've been appointed their guardian-ad-litem is that neither of them are being served by the continuation of his catastrophically impaired life, nor is there any reasonable or realistic expectation that this situation will ever change. (T93. Vol. 7, p. 121).

3. Much of what petitioner claims here already has been addressed in paragraph 1, above. All parties and the courts clearly recognized that, whatever Martin's current physical and mental abilities might be, he appears content with his present condition and surroundings, and is

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Dependent and Disabled submitted an amicus brief on behalf of itself, the Michigan Handicapper Caucus and the Ethics and Advocacy Taskforce for the Nursing Home Action Group.

not in great pain, terminally ill, or in a persistent vegetative or comatose state. Being a "total care patient" is neither the functional nor logical equivalent of being in a persistent vegetative state. Petitioner's footnote 5 establishes nothing more than Martin's legal incapacity to make decisions concerning his care and treatment.

Martin's cognitive skills and abilities were assessed in detail in the neuropsychological report of Dr. Walter Zetusky, who has doctorates in neurochemistry and neuropsychology and has extensive experience working with individuals who have brain injuries. (T93. Vol. 3 pp. 151-158). The Neurologic Center asked Dr. Zetusky to evaluate Martin in 1990 for treatment purposes only.[3] His report (Mich R pp. 42a-45a) and later testimony (T93. Vol. 3. pp. 165-181p; Mich R pp. 46a-62a) establish that Martin has an intelligence quotient of 63, but because of a significant degree of scatter due to concentration and communication problems, it could be as high as 77, with the average IQ being between 90 and 110.

Petitioner cites to Martin's "numerous" uncorroborated discussions with her concerning his wishes and not using "machines." The record does not support a finding that Martin's previous expressions of intent to not live in a dependent state included the desire to have food and water withheld, nor is there any suggestion that he had an informed understanding of the consequences of such withdrawal, which would result in a slow and painful death by starvation.

Equally important, all testimony purportedly supporting the claim that Martin previously had authorized

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[3] Dr. Zetusky's evaluation and IQ testing and report occurred 1½ years before the petitioner filed her Petition for Removal of Life Supports.

the withdrawal of food and water in his present circumstance came from a single source – his guardian and wife. As the *Cruzan* Court suggested, the quality and quantity of the testimony petitioner now claims constituted clear and convincing evidence likely would not have been permitted into court had this been a run-of-the-mill civil suit, due to application of the statute of frauds, the parol evidence rule and the hearsay rules, *Cruzan*, at 285. Indeed, under Michigan's Designation of Patient Advocate Act[4] the petitioner would not be permitted to act even as a witness to his written designation of an advocate. It is that same testimony of uncorroborated statements to petitioner which she now claims for the first time also operated to designate her as Martin's surrogate. This is especially significant given the possible conflict of interest and petitioner's comments regarding the degradation.

4. The petitioner accurately reports the Michigan Court of Appeals decision [*Martin II*] in this paragraph. However, the Michigan Supreme Court reversed the Court of Appeals after stating the "clear and convincing evidence" standard[5] it adopted in its decision. The Court

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[4] MCL 700.496; MSA 27.5496. The Act was enacted several years after Martin's catastrophic accident.

[5] The Court stated that clear and convincing evidence is such evidence which:

> "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been

specifically found that the petitioner's uncorroborated testimony and affidavit was not "so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue, [citation omitted]." *Id.*, 450 Mich. at 233. The evidence, even if accurate, simply was not substantial enough to justify the authorization the petitioner sought, nor is it sufficient to support the claim now made that Martin "designated" his guardian as his lawful "surrogate."

5. Petitioner for the first time raises the question of why the Michigan Supreme Court "was free to disregard Michael's clear wish to have Mary take charge of his treatment decisions in the event of his incapacity."[6] There is no record evidence whatsoever that Martin specifically stated to petitioner that he designated her as his surrogate. She relies instead on such rough comments as that "I will haunt you" to indicate Martin's alleged desire that petitioner be his surrogate. Not one other witness, including those friends with whom Martin had discussed not living like a vegetable, testified on that point.

When this case first was filed, this Court's decision in *Cruzan* already was two years old. There was no question that petitioner had the burden of proof on all issues, nor was there any question in Michigan that her constitutional standard of proof, also per *Cruzan*, was "clear and convincing" evidence. The case was tried as a power of guardian case, and the Michigan Supreme Court properly held that the common law doctrine of informed consent, assuming the burden of proof was met, allowed a third party to exercise the choices of a formerly competent

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contradicted. [*In re Jobes*, [108 N. J. 394, 529 A.2d 434 (1987)] at 407-408.] *Id.*, 450 Mich. at 227.

[6] Petitioner's Petition for Writ of Certiorari, p. 9.

person. Thus, Michigan law provides access to surrogate decision making, but the Supreme Court said the evidence here does not meet Michigan standards.

Using the doctrine of informed consent and the clear and convincing evidence standard, the Michigan Supreme Court protected both the petitioner's right to due process, and Martin's right not to be separated from his daily food absent evidence meeting the enunciated standard. The petitioner could not meet her burden with the facts presented at the hearings. Petitioner's loss on the facts is not elevated to a constitutional violation under either theory here advanced by petitioner. Plainly and simply, the *Martin* Court did what courts across the states have done over these past twenty years. The Court took the state of the accepted law on cases involving the withdrawal of life support systems, as developed in the laboratory of the states, and fairly applied it to the facts here.

REASONS FOR DENYING THE PETITION

The Missouri Supreme Court, in *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), affirmed by this Court in *Cruzan, supra*, identified what might be the key force behind a state's interest in preserving the lives of people who are in situations similar to Michael Martin's. The Court stated:

> Where the patient is not terminally ill, as here, the profoundly diminished capacity of the patient and the near certainty that the condition will not change leads inevitably to quality of life considerations. The argument made here, that Nancy will not recover, is but a thinly veiled statement that her life in its present form is not worth living. Yet a diminished quality of life does not support a decision to cause death. *Cruzan v. Harmon*, 760 S.W.2d at 424.

The petitioner's brief infers that the history of state court involvement in cases questioning the authority of surrogates to exercise the treatment interests of people unable to do so for themselves is a recent development. This is not true. The first reported state appellate court decision on the issue, *In re Quinlan*, 355 A.2d 647 (N.J., 1976) *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976), was litigated more than twenty years ago, and was decided nineteen years ago. Since *Quinlan*, multiple states have confronted the general issue presented here. Indeed, all 50 states and the District of Columbia now have some form of living will or patient advocacy statute in place to address the surrogate decision making issue.[7]

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[7] Indeed, this Court received and denied eight petitions for Writ of Certiorari on these issues in the fifteen years prior to its decision in *Cruzan*, including the *Quinlan* case: *In re Philip B.*, 156 Cal. Rptr. 48 (Ct. App. 1979), *cert. denied sub nom. Bothman v. Warren B.*, 445 U.S. 949 (1980); *Drabick v. Drabick*, 245 Cal. Rptr. 840 (Ct. App.), *cert. denied*, 488 U.S. 958 (1988), *reh'g denied*, 488 U.S. 1024 (1989); *In re Prange*, 520 N.E. 2d 946 (Ill. App. Ct.), *vacated*, 527 N.E. 2d 303 (Ill.), *cert. denied sub nom. Murphy v. Benson*, 488 U.S. 892 (1988); *In re Infant Doe*, No. GU8204-00 (Ind. Cir. Ct. Monroe County Apr. 12, 1982), *writ of mandamus dismissed sub nom. State ex rel Infant Doe v. Baker*, No. 482 S 140 (Ind. May 27, 1982), *cert. denied*, 464 U.S. 961 (1983); *In re Jobes*, 529 A.2d 434 (N.J.), *reconsideration and stay denied*, 531 A.2d 1360 (N.J. 1987), *cert. denied sub nom. Lincoln Park Nursing & Convalescent Home v. Kahn*, 483 U.S. 1036 (1987); *Quinlan, supra; In re Storar*, 420 N.E. 2d 64 (N.Y.), *cert. denied*, 454 U.S. 858 (1981); *Weber v. Stony Brook Hosp.*, 456 N.E. 2d 1186 (N.Y.), *cert. denied*, 424 U.S. 1026 (1983). Since *Cruzan*, this Court has denied at least four more such petitions: *In re Baby "K,"* 16 F.3d 590 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 91 (1994); *Johnson v. Thompson*, 971 F.2d 1487 (10th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3581 (U.S. Feb. 23, 1993); *In re Jane Doe*, 583 N.E.2d 1263 (Mass. 1992), *cert. denied sub nom. Doe v. Gross*, 112 S. Ct. 1512 (1992); *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied sub nom. Kevorkian v. Michigan*, 115 S. Ct. 1795 (1995).

Against this backdrop, this Court's *Cruzan* decision did not state new law or change the way most state courts evaluated surrogate requests. Rather, *Cruzan* ratified the principle that the states are the proper laboratory within which these issues should be debated and decided; and that the states' interests in protecting the lives of its citizens through the adoption of strict measures to insure the validity of a previously expressed intent does not offend the Fourteenth Amendment.

The Michigan Supreme Court recognized that an individual has the right to refuse unwanted medical treatment, but also noted the state's interest in protecting life. Key to its decision was the fact that Martin, while legally incompetent, is not in pain, terminally ill nor in a persistent vegetative state. Under those facts, the Court stated that Michigan would not permit withdrawal of life sustaining medical treatment on the basis of any test utilizing objective criteria, including the substituted judgment test or best interest test. *Martin, supra,* 450 Mich. at 224, 225.[8]

The *Martin* Court decision here follows the analytical path carved by the several states and *Cruzan* over the past twenty years. In its mainstream decision the Court did not reject the petitioner's claim that she had the right

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[8] The Court wrote:

> We cannot stress too strongly that the complexity and ramifications of any decision in this area caution against moving too swiftly or adopting controversial decision-making standards in cases that do not present facts compelling such decision. The right of informed consent extends only to the decisions this particular patient has made. Any objective analysis is not encompassed within the right of informed consent. As we noted at the outset, if we are to err, we must err in preserving life. Our first step in this area must be a careful one. *Id.*, 450 Mich. at 225.

to assert Martin's rights for him. The Court instead recognized that her right was not absolute, and rejected the evidence she presented to support her claim that she was doing what Martin would have wanted her to do. In so doing, the Court followed the tenets and evidence standards tested by the laboratory of the states and ratified in *Cruzan*. As argued below, the Court's factual determination and legal analysis was consistent with the state supreme court level decisions in *In re Westchester County Medical Center on behalf of O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607 (N.Y., 1988) (O'Connor), and *In re Jobes, supra*, where the courts declined to authorize the removal of life support systems despite evidence of intent substantially more developed and compelling than the uncorroborated evidence presented here.[9]

Petitioner poses two arguments here. She first claims that the Michigan Supreme Court unconstitutionally extended the scope of *Cruzan* by appending what she refers to as a "special circumstances" test to the type of "clear and convincing evidence" test approved by this Court in *Cruzan*. Second, she claims for the first time that the Michigan Supreme Court improperly and unconstitutionally infringed upon Martin's 14th Amendment rights by refusing to defer to petitioner's right as his surrogate to make treatment decisions. These claims are addressed below.

Before addressing petitioner's claims, however, it is necessary to review this Court's holding in *Cruzan* to identify precisely what was decided. In *Cruzan*, this Court was asked on 14th Amendment grounds to reverse a Missouri Supreme Court decision upholding the need for strict compliance with a state living will statute in order for a third party to effectuate the withdrawal of the

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[9] See *Cruzan, supra*, 285, fn. 11.

life support systems of a person incapable of authorizing the termination herself because she was in a persistent vegetative state. The case was framed as one pitting the state's right to enforce its statutes against the purported constitutional violation which would occur if a third party were not permitted to step in and assume the constitutional rights of the petition subject. Chief Justice Rehnquist, writing for the majority, rejected this proposition. He wrote that:

> Here again petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way.
>
> No doubt is engendered by anything in this record but that Nancy Cruzan's mother and father are loving and caring parents. If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. *But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself.* Close family members may have a strong feeling – a feeling not at all ignoble or unworthy, but not entirely disinterested, either – that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. *Id.*, at 286, [emphasis added].

After summarizing and discussing the many state decisions which had addressed this issue, Chief Justice Rehnquist observed that:

> As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. Beyond

> that, these decisions demonstrate both similarity and diversity in their approach to decision that of what all agree is a perplexing question with unusually strong moral and ethical overtones. State courts have available to them for decision a number of sources – state constitutions, statutes, and common law – which are not available to us. In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did. . . . *Id.*, at 277.

The balance between the person's interest and the state's interest likewise was evaluated. The Court noted Missouri's claim that it had a legitimate "interest in the protection and preservation of human life," *Id.*, at 280, and agreed that "there can be no gainsaying this interest." *Id.* The Court then observed that:

> [I]n the contest presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. *Id.*, at 281.

Balancing that interest against an individual's Fourteenth Amendment liberty interests, the Court explained that:

> It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient." *In re Jobes*, [*supra*]. A State is entitled to guard against potential abuses in such situations. *Id.*

The Court then ruled that, indeed, Missouri did have the right to choose a route or process by which such claims could be tested by the state within its judicial system. The Court stated:

> We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically-able adult to starve to death.
>
> . . .
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> . . . We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. . . . A state is entitled to guard against potential abuses in such situations. Similarly, a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one . . . Finally, we think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interest of the individual. *Id.*, 280-282.[10]

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[10] This holding, that the state may "safeguard the personal element of this choice" through "heightened evidentiary requirements," necessarily included the right to:

> . . . [P]lace an increased risk of erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment . . . In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. *Id.*, at 283.

As in *Cruzan*, the test here is whether the *Martin* Court's approach violated Martin's 14th Amendment rights. In applying *Cruzan* to these facts, particularly as it relates to the state's interest, it is important to note one substantial fact difference between the cases. In *Cruzan*, Nancy Cruzan was in a persistent vegetative state. Here, Michael Martin is neither in a persistent vegetative state nor terminally ill. Moreover, Martin arguably is manifesting a present desire to live.[11]

I.

Petitioner asserts as her first error that the Michigan Supreme Court decision, by "requir[ing] additional specificity in Michael's description of his condition,"[12] and its alleged failure to "provide citizens with adequate notice of the steps they must take in order to protect their liberty interests,"[13] "unjustifiably extends *Cruzan*'s holding and effectively denies Michael his constitutionally protected interest in being free from invasive and unwanted medical treatment."[14] In essence, petitioner claims that the decision " . . . transforms the clear and

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[11] At trial and on appeal respondents persistently asserted the issue of Martin's present desire to live, as manifested in his adaptability to his circumstances and living setting, as well as in his communications to respondents and others. Respondents argued that, whatever Martin's previously expressed intentions while competent might have been, his present desire to live, however communicated, overrode or revoked his previously expressed intent. The trial court and Court of Appeals did not consider this issue. The Supreme Court declined to review this issue because it was not necessary given its fact-based disposition of the case. (See *Martin, supra*, 450 Mich. at 217, fn. 10.)

[12] Petition for Writ of Certiorari, p. 15.

[13] *Id.*

[14] *Id.*, at p. 12.

convincing evidence standard into one that requires proof 'beyond all doubt.' "[15]

Petitioner's claim seeks to elevate a factual determination with which she disagrees to a constitutional level. Neither *Cruzan* nor the cases upon which its analysis relies countenance such a result. The *Martin* Court engaged in much the same type of analysis as did this Court in *Cruzan*. In its analysis, the *Martin* Court concluded that the right to access to a third party surrogate arises in Michigan by operation of the common law doctrine of informed consent.[16]

The Court summarized the various state approaches to surrogate decision making before settling on the purely subjective standard.[17] Upon adopting the subjective standard, the Court stated its test to determine whether a surrogate should be allowed to consent to the removal of life supporting medical systems:

> Given that the right the surrogate is seeking to effectuate is the incompetent patient's right to

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[15] *Id.*, at p. 13.

[16] "Because the evidentiary and decision-making standards appropriate in a given case do not depend on the source of the right, we need only ground the right in one source.

. . .

We agree with the *[In re] Rosebush* Court [195 Mich. App. 675, 491 N.W.2d 633 (1992)] that a necessary corollary of the common-law right to informed consent is the right not to consent. [Citation and footnote omitted.] . . .

Thus, because we find that the common-law doctrine of informed consent allows a person to refuse life-sustaining treatment, we also decline the invitation to reach the propriety of the constitutional and statutory issues in this case." *Martin, supra*, 450 Mich. at 215-216.

[17] "We find that a purely subjective analysis is the most appropriate standard to apply under the facts of this case." *Id.*, 450 Mich. at 221.

> control his own life, "[t]he question is not what a reasonable or average person would have chosen to do under the circumstances but what the particular patient would have done if able to choose for himself." [Citing *In re Conroy*, 98 N.J. 321, 360-361, 486 A.2d 1209 (1985).] The patient's statements, made while competent, must illustrate "a firm and settled commitment to the termination of life supports *under the circumstances like those presented*. [Citing *O'Connor, supra*, 72 N.Y.2d at 517]. *Id.*, 450 Mich. at 221, emphasis added.

The Court justified the imposition of this test by noting that in those cases which allowed a more objective test, "the patient generally has been comatose or in a persistent vegetative state, . . . " *Id.*, 450 Mich. at 223. The Court further held that:

> In this case, Michael's life and health are not threatened by infirmities of this nature. Because he was competent and able to express his wishes and desires, we decline to move along the continuum from the subjective standard.[18] *Id.*

The Court's final determination was identifying the proper standard of proof. Mirroring this Court's *Cruzan* analysis, the Court adopted the clear and convincing evidence standard,[19] noting that:

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[18] The Court opined that "[e]ven if a test involving objective criteria were applicable in this case, the objective criteria would only strengthen our decision that nutrition and hydration should continue to be provided. . . . By all accounts, Michael is not experiencing any type of pain that would outweigh any enjoyment or pleasure he is experiencing." *Id.*, 450 Mich. at 225-226, fn. 16.

[19] The definition appears at footnote 5, *supra*.

> Among the factors identified as important in defining clear and convincing evidence, [citations omitted] the predominant factor is "a prior directive in which the patient addresses the situations in which the patient would prefer that medical intervention cease." [Citation omitted] *Id.*, 450 Mich. at 227.

It is in this context that petitioner's claim must be evaluated and ultimately must fail. It is disingenuous for petitioner now to claim that Michigan's "specific circumstances" test, such as it is, impermissibly expands this Court's *Cruzan* decision. The Michigan Supreme Court narrowly crafted its analysis to the circumstances with which it was confronted.[20] Its analysis followed this Court's lead in *Cruzan* in every instance, and its statement of the law conforms with *Cruzan*. Indeed, in *Cruzan*, this Court recognized Missouri's central focus on the patient's *wishes*.[21] Michigan took that precise approach, requiring clear and convincing evidence as to Martin's pre-accident wishes. It properly found that those wishes could not be clearly and convincingly determined from the uncorroborated testimony of the petitioner.

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[20] "We express no opinion about the proper decision-making standard for patients who have never been competent, patients existing in a persistent vegetative state, patients who are experiencing great pain or patients who are terminally ill. If a patient has any of these conditions, or ailments of a similar nature, a more objective approach may be necessary and appropriate." *Id.*, 450 Mich. at 223, fn. 15.

[21] "Missouri requires that evidence of the incompetent's *wishes* as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not." *Cruzan, supra*, at 280, emphasis added.

Petitioner cites three cases to support her assertion that the *Martin* Court erred in its factual determination that Martin's wishes were not clearly and convincingly stated. It is sufficient here to note that in all three cited cases,[22] the petition subjects either were in a persistent vegetative state or were terminally ill. This is particularly important because, as the *Martin* Court recognized, the state's interest in life is elevated if the petition subject is neither in a persistent vegetative state nor terminally ill. Whatever weight the courts in those cases chose to give to the patients' previously expressed intent necessarily was tempered by their then-present medical condition. The *Martin* Court specifically and emphatically declined to analyze the Martin case in those terms.[23]

The determination of "clear and convincing" evidence cannot be made in a vacuum, without considering the general principles regarding the weight and sufficiency of evidence – including the relative value of hearsay; the sufficiency of oral statements of intent when processes exist to integrate intent into a written instrument; the weight of the uncorroborated testimony of an interested party; and the strength of a factual finding which depends upon the testimony of a single witness.

Fortunately, case law from termination of life support cases in other jurisdictions provides guidance on what type of proof rises to the level of "clear and convincing" evidence. In *Cruzan*, the Missouri Supreme Court found that statements similar to those claimed in the present case – although made to a totally disinterested party –

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[22] *Elbaum v. Grace Plaza, Inc.*, 544 N.Y.2d 840 (N.Y. App. Div. 1989) (petition subject in persistent vegetative state); *In re Tavel*, 661 A.2d 1061 (Del. 1995) (92 year old petition subject terminally ill); *In re Swan*, 569 A.2d 1202 (Me. 1990) (petition subject in persistent vegetative state).

[23] See footnote 20, *supra*.

were insufficient to constitute clear and convincing evidence. To rely upon evidence such as Cruzan's statement that she "would not want to continue her present existence without hope as it is," the Missouri court expressed concern about the general nature of her statements, which she made in response to other people's medical condition and treatment, finding that they closely resemble the types of evidence courts have characterized as unreliable. *Cruzan v. Harmon, supra,* 760 S.W.2d at 424. This Court affirmed, saying that Missouri committed no "constitutional error in reaching the conclusion that it did." *Cruzan,* at 285.

Further indications of the high degree of certainty required are found in *O'Connor, supra,* where New York's highest court rejected the numerous statements O'Connor made to three persons over a twenty-year period that she did not want to go on living if she could not "take care of herself and make her own decisions" and "would never want any sort of intervention [or] any sort of life support systems to maintain or prolong her life." Witnesses also ascribed statements to O'Connor – similar to those beliefs here ascribed to Martin – that she hated hospitals and never wished to be in one again, saying "I would never want to lose my dignity." *Id.,* at 531 N.E.2d 610-11.

In reversing lower court decisions ordering that intravenous feeding be discontinued, the Court contrasted O'Connor's statements with those made by a person who exhibits the care of putting her desires in writing, and with those oral statements at issue in *Eichnar v. Dillon,* 52 N.Y.2d 363; 420 N.E.2d 64 (1981), in which the person carefully reflected on the use of a ventilator should he enter a persistent vegetative state. O'Connor's statements, by contrast, were of a type made by many people, especially older people, and the court was concerned about the policy issues raised by relying upon

such statements by a person with a non-terminal condition:

> [I]f such statements were routinely held to be clear and convincing proof of a general intent to decline all medical treatment once incompetency sets in, few nursing home patients would ever receive life-sustaining medical treatment in the future. *Supra*, at 614.

In *Matter of Hughes*, 259 N.J. Super. 193, 661 A.2d 1148 (N.J. Super. AD, 1992), the subject, a Jehovah's Witness, had, just prior to a scheduled operation, specifically advised the hospital and her doctor in writing not to administer a blood transfusion. She also expressed this orally to three family members and the doctor. Although she told five distinct people her specific intent about a specific procedure, and put her intent in writing, and despite having taken such steps contemporaneous to the surgery, these expressions did not constitute clear and convincing evidence. Rather, the court found that the evidence did not show that the patient had made this decision with "full knowledge of the ramifications," including the possibility of complications necessitating a transfusion to save her life.

In the present case, Michael Martin's purported statements are not markedly different than Nancy Cruzan's: neither statement dealt "in terms with withdrawal of medical treatment or of hydration and nutrition." *Id.* at 285.[24]

The difficulty of adequately projecting all future types of care and treatment does not, as petitioner claims, justify a loosening of evidentiary standards so that common statements such as "no machines" becomes "no food

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[24] This Court in *Cruzan* similarly found that the Cruzan facts were less persuasive than the facts in *O'Connor* and *Jobes*. See *Id.*, at 285, fn. 11.

or water," and "not as a vegetable" becomes "not as a conscious and aware but seriously injured person." If such is deemed to be sufficient to encompass all future variables, our nursing homes may soon be empty. The difficulty of anticipating future events, rather than creating carte blanche for family members and medical personnel, dictates that the approach to future care mirror the standard applied to "informed consent" for present care. If a person who currently is competent to exercise his or her decision making capacity must consider all possible treatments and ramifications, then it also is reasonable to insist that a person seeking to establish guidelines for his or her future care do the same.[25]

Petitioner's notice claim, too, is without merit. At the time of Martin's accident, the state of the law was not yet clear as to whether his wishes could have been honored even if he had been specific as to his non-persistent vegetative existence on a feeding tube. He had the option and opportunity to reduce his wishes to writing, again with no clearly established legal right in Michigan to have those wishes implemented. Martin's liberty interests were not clearly defined at the time of his accident.[26] It is illogical to say that a person who has uncertain legal

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[25] It should be noted that the *Martin* Court did not rule out the use of objective criteria in a situation involving a person who is vegetative, terminally ill, or in great pain. See footnote 20 *supra*.

[26] Michigan's Patient Advocate Act, *supra*, passed in 1990, would allow a properly designated third person to execute a patient's treatment decisions if the patient were unable to do so. As petitioner notes, "Michigan still does not have any statute that explicitly recognizes living wills." Petitioner's Petition for Writ of Certiorari, p. 17, fn. 9. It should also be noted, however, that the Patient Advocate Act embraces the content of a living will statute.

rights, if indeed he has any legal rights in the matter at all, is somehow denied notice of the steps to take to preserve those uncertain, and possibly non-existent rights when a court, several years later, finally defines the scope of those rights for him and all Michigan citizens.

The Michigan Supreme Court constitutionally determined that Michael Martin's previously expressed wishes did not clearly and convincingly demonstrate that he would want petitioner, or any other person, withdrawing his feeding tube in his present physical situation. Further, Martin has demonstrated a current desire to live. Petitioner's Petition for Writ of Certiorari on this issue should be denied, and respondents so request this Court.

II.

Petitioner, for the first time in this case's nearly four-year history, raises an issue of purported constitutional significance. Specifically, the petitioner claims that this case raises a question this Court left open in *Cruzan*:

> Whether a State has a constitutional obligation to "defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual."[27]

Petitioner, in order to comply with SUP. CT. R. 14.1(h)[28], which requires a petitioner to "specify the stage

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[27] Petition for Writ of Certiorari, p. 16, quoting *Cruzan, supra*, at 287, fn. 12.

[28] SUP. CT. R. 14.1(h) reads in its entirety as follows:
If review of a judgment of a state court is sought, the statement of the case shall also specify the state in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions

in the proceedings, both in the court of first instance and in the appellate courts" where the federal or constitutional question was raised, claims in a footnote that:

> While [Petitioner] Mary Martin's brief did not specifically cite footnote 12 of the *Cruzan* opinion (parenthetical omitted), its broad reliance on that case and its repeated assertion and defense of Mary as the proper guardian and the person Michael entrusted to ensure that he not be forced to endure life-sustaining medical treatment once his prognosis became hopeless, placed the issue noted in footnote 12 squarely before the Michigan Supreme Court.[29]

Respondents first contend that petitioner failed in any instance to place this issue squarely before any Michigan court, and that therefore petitioner has failed to preserve the issue for appeal to this Court. Further, petitioner has failed to comply with SUP. CT. R. 14.1(h).

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). Here, petitioner's comment tacitly admits that the precise question she

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> sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts: and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

[29] Petitioner's Petition for Writ of Certiorari, p. 8, fn. 6.

seeks to place before this Court has not been litigated below. Nor can it be said that the question was implicitly considered and decided within the other issues considered in the courts below.[30] The *Cruzan* Court, in preserving the question, arguably anticipated a situation where the surrogate's appointment and authority – with specific powers to decide life and death issues for the patient whether or not the patient had previously expressed treatment opinions – was clearly and expressly stated, so that the appointment and authority themselves were not in dispute.

For example, given the skepticism this Court expressed in *Cruzan* regarding unwritten hearsay evidence, it very well could be that such evidence purporting to establish the designation of a surrogate would be viewed as similarly problematic. Since the same compelling state interests would apply to a decision to withdraw

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[30] Indeed, for the question to be ripe, several specific issues should have been argued and decided by the lower courts. These issues would at least include: 1) whether Martin appointed petitioner as his "surrogate;" 2) what standard of proof would be required to determine that Martin did, in fact, appoint petitioner as his "surrogate;" 3) whether this purported designation of a surrogate was corroborated by other, uninterested parties, including the friends with whom Martin had discussed his views; 4) whether a "surrogate" appointment as contemplated by the *Cruzan* footnote would require that the appointment itself be in a writing similar to the writings required to validate wills and transfers of property; and 5) whether Martin's post-injury acceptance of his situation and his expressed desire to live would operate to revoke such an appointment, assuming an appointment had been made. Michigan's policy interest in preserving life, as manifested in its Patient Advocacy Act, *supra*, which had taken effect prior to the hearings in this case, although not directly applicable to this case, also should have been factored into any Michigan court's determination of whether Martin had named petitioner as his surrogate.

life supporting medical equipment made by a surrogate, it is difficult to see how a lesser evidentiary standard would be justified. Further, the designation-of-a-surrogate issue raises *additional* state interests, such as the state's *parens patriae* interest in protecting incompetent persons from abuse and overreaching, so that an even stricter standard regarding the quality of evidence required would be in order.

Petitioner's failure to raise this issue in any of the several layers of proceedings below deprived the Michigan courts of all opportunity to review it. This Court and respondents likewise are denied the chance to review and debate the question to the depth and degree of sophistication anticipated by this Court, and required by jurisprudence to insure the quality and accuracy of the result. For these reasons alone, petitioner's petition to appeal this issue should be denied.

Even if the petitioner did properly raise and preserve the issue below, this Court still should not hear it. Chief Justice Rehnquist, in *Cruzan*, anticipated the argument the petitioner really makes here, that she should be able to decide Martin's course because she is his wife. He observed that:

> Petitioners alternatively contend that Missouri must accept the "substituted judgment" of close family members even in the absence of substantial proof that their views reflect the views of the patient. They rely primarily upon our decisions in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), and *Parham v. J.R.*, 442 U.S. 584 (1979). But we do not think these cases support their claim. In *Michael H.*, we *upheld* the constitutionality of California's favored treatment of traditional family relationships; such a holding may not be turned around into a constitutional

> requirement that a State *must* recognize the primacy of those relationships in a situation like this. And in *Parham*, where the patient was a minor, we also *upheld* the constitutionality of a state scheme in which parents made certain decisions for mentally ill minors. Here again petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way. *Id.*, 285-286, emphasis in original.

Likewise, petitioner's reliance on *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992) is misplaced. In *Casey*, this Court wrestled with principles which are present here. The central issue in *Casey*, as here, was what power or interest, if any, a state had in regulating activity that directly impacted on an individual's fundamental liberty interests. A careful reading of *Casey* can only lead to one conclusion – a state's interest in the regulation increases as the interest in life [in *Casey*, the viability of the fetus] increases. The *Casey* Court noted that:

> We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted. *Id.*, 112 S. Ct. at 2816.

That same policy applies here. The state's interest in preserving life increases precisely because Martin is not terminally ill, comatose, or in pain, and he is expressing a current will to live. The *Martin* Court properly concluded that Martin's statements to petitioner did not rise to the

level of clear and convincing proof of what, under the informed consent doctrine, would have been his "intent" given his present condition.[31]

Petitioner asserts that those same insufficient statements now constitute his appointment of her as his "surrogate," and argue that she therefore should be authorized under constitutional principles to exercise her own judgment, and to consent to the termination of his life. This claim is diametrically opposed to the elevated state interest in life found in *Casey*, given Martin's present physical and mental condition.[32] Were petitioner to prevail in her claim, the effect would be that Martin's constitutionally protected liberty interest in life itself would be extinguished because the state's ability to assert its elevated interest in the preservation of life would be eliminated.[33] This outcome must be rejected.

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[31] Petitioner's reliance on *Casey* also is misplaced in light of *Casey*'s call to consult the concept of ordered liberty, as demonstrated by the traditions of the states. In this regard, no state common law decision has authorized termination of life supporting equipment for an incompetent person who is not terminally ill, in a persistent vegetative state, or in intractable pain. Further, in recent years the states have enacted living will and durable power of attorney statutes, none of which authorized termination of life supporting equipment for an individual who is not terminally ill or in a persistent vegetative state absent a writing.

[32] The state's interest also is magnified here because of Martin's current liberty interest, as expressed by the evident manifestation of a current desire to live, and because of the inadequacy of the evidence upon which petitioner's primary legal assertion rested and failed.

[33] Indeed, if the petitioner's argument were successful, the whole legal focus would shift from the expressed interests of the subject of the petition to whether the "surrogate" was duly appointed as the surrogate. If a surrogate has the authority to

CONCLUSION

The Michigan Supreme Court appropriately recognized the state's interest in protecting Michael Martin's constitutional liberty interest in life by imposing a heightened evidence standard against which to measure petitioner's claims of Martin's previously expressed wishes. The *Martin* Court properly found that the evidence presented by petitioner to demonstrate Martin's previously expressed wishes was legally and factually insufficient because it did not meet Michigan's clear and convincing evidence standard. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December 26, 1995

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decide such issues without reference to the wishes of the subject himself or herself, and without the opportunity of a state to regulate or question that decision making process, the lives of literally hundreds of thousands of people who were elderly or disabled would be placed in peril.

Supreme Court, U.S.
FILED
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No. 95-821

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MARY MARTIN, Guardian of Michael Martin,
Petitioner,
v.
PATRICIA MAJOR and LEETA MARTIN,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

BRIEF OF THE UNIVERSITY OF MICHIGAN MEDICAL CENTER, WILLIAM BEAUMONT HOSPITAL, HENRY FORD HEALTH SYSTEM AND CHOICE IN DYING, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

The University of Michigan Medical Center (the "Center"), located in Ann Arbor, Michigan, is an 880 bed facility with 156 intensive care unit beds. The Center provides intensive care to a substantial number of nursing home, elderly, and acutely-ill individuals. It has an active ethics committee and has been intimately involved with life-support issues for the past 20 years.

William Beaumont Hospital (the "Hospital"), located in Royal Oak, Michigan, operates two hospitals compris-

ing 1,118 beds in Oakland County, Michigan. The Royal Oak facility is a tertiary care center. The Troy facility is a community hospital. The Hospital operates outpatient clinics, and has residency programs for training physicians. Through its nursing home subsidiaries, the Hospital has 834 assisted living and skilled nursing home beds. End-of-life decisions are addressed by the multidisciplinary Ethics Education and Patient Rights committees.

Henry Ford Health System (the "System") is a regional, vertically integrated health care delivery system located in the Metropolitan Detroit area. It consists of 6 hospitals, 2 nursing homes, a chemical dependency facility and 35 ambulatory care clinics. The System includes a closed group practice of over 1,000 physicians, a teaching program with over 700 house officers and a health maintenance organization of over 450,000 members. Through its Ethics Committee, the System frequently deals with termination of life-sustaining treatment issues.

Choice In Dying, Inc. ("Choice In Dying") is a national, not-for-profit organization dedicated to addressing the legal, ethical and social issues involved in end-of-life decision making, as well as ensuring the proper care of dying patients. The organization was formed in 1991 by the merger of the Concern for Dying and the Society for the Right to Die.

Because Choice In Dying is considered a national expert on issues surrounding the right to die, it and its predecessor organizations have filed briefs as *amicus curiae* in most of the major right-to-die cases decided in recent years, including: *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *In re Busalacchi*, No. 73677, 1993 WL 288532 (Mo. Jan. 26, 1993) (*en banc*); *DeGrella v. Elston*, 858 S.W.2d 698 (Ky. 1993); *In re Guardianship of Jane Doe*, 583 N.E.2d 1263 (Mass.), *cert. denied sub nom. Doe v. Gross*, 503 U.S. 950 (1992); *McConnell v. Beverly Enters.-Connecticut, Inc.*, 553 A.2d 596 (Conn. 1989); *In re Drabick*, 245

Cal. Rptr. 840 (Ct. App.), *cert. denied,* 188 U.S. 1024 (1988); and *In re Jobes,* 529 A.2d 434 (N.J. 1987). In addition, Choice In Dying regularly provides information on legislation, regulation and judicial action to the general public, the practicing bar, health care providers, the clergy and others concerned with the legislative and judicial processes. The organization has a membership of approximately 65,000 nationwide, nearly 1,600 of whom reside in Michigan.[1]

SUMMARY OF ARGUMENT

1. The Michigan Supreme Court's determination that a state need not honor an individual's prior expressed wishes concerning his treatment unless the individual predicted the "specific circumstances" under which he would lose capacity makes no sense from a medical perspective. There are a wide array of closely related medical conditions in which a patient may lose permanently the capacity to make medical decisions. Thus, it is impossible for an individual, even one who is medically sophisticated, to predict with certainty the "specific circumstances" which will lead to the loss of capacity.

For precisely this reason, states such as Michigan have adopted formal mechanisms which allow individuals to appoint surrogates for medical decision making. Surrogates can, and are specifically empowered to, address unanticipated problems which arise in circumstances the patient was unable specifically to foresee.

By allowing patients' wishes to be honored only in those circumstances which the patient has specifically predicted, the Michigan Supreme Court has taken away the direct means by which patients can control their own care. And by precluding surrogates from acting except where pa-

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[1] Pursuant to Rule 37.3(a) of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

tients have specifically predicted their condition, that court has also taken away the indirect mechanism by which patients can control their care. By closing off both of these avenues, that court has impermissibly burdened the liberty interest of patients to control their own medical care.

In taking these actions, the Michigan Supreme Court also has radically interfered with the means by which decisions about termination of treatment currently are made. Such decisions typically are made (and traditionally have been made) by physicians, acting on the basis of whatever wishes the patient has expressed, and in consultation with the patient's family. And, to assist in and to ensure the propriety of such decisions, most states, including Michigan, have established formal mechanisms by which patients can express their wishes, and most hospitals have established ethics committees to help resolve difficult issues.

Under the regime established by the decision below, however, physicians will be unable, except in rare instances, to determine whether to withdraw life-prolonging treatment on the basis of their knowledge of a patient's wishes and conversations with a patient's family. Instead, they will be forced to seek court approval of their actions. That additional step will unnecessarily interfere with physicians' relationships with their patients.

That interference is not an abstract concern. Empirical studies demonstrate that a significant mismatch currently exists between the amount of terminal care that patients want and the amount of care they receive. That mismatch exists, in large measure, because of uncertainty among providers about the circumstances under which they legally can withhold or withdraw treatment, and it can only be exacerbated by court decisions, such as the Michigan Supreme Court's, which make it more difficult for physicians to follow patients' wishes concerning termination of treatment, whether expressed directly by patients or by their surrogates.

2. This Court should not permit state courts, such as the Michigan Supreme Court, drastically to restrict the circumstances under which a duly appointed surrogate may act. Few individuals provide explicit instructions regarding their wishes in the event they lose the capacity to make medical decisions for themselves. Thus, as a practical matter, health care providers must rely on surrogates to ensure that they abide by a patient's general wishes and values. Unless this Court makes clear that surrogates play an important role in protecting and advancing patients' liberty interests, the efforts of many state legislatures (including Michigan's), as well as the efforts of many hospitals, to promote surrogate decision making will be thwarted.

3. Finally, the Michigan Supreme Court's decision, if allowed to stand, will have a deleterious effect on decisions made by patients in that state. Without reasonable assurances that their wishes concerning termination of treatment will be honored, many patients will elect simply to forgo certain interventions, even those which have some chance of providing great benefit. As a result, patients may pass up treatments which, from a purely medical perspective, they should try.

REASONS FOR GRANTING THE WRIT

While the *Martin* majority attempts to limit the scope of its holding to the narrow facts present, the opinion is inconsistent and its effect extends beyond just patients in Michael Martin's precise condition and surrogates attempting to effect those patients' wishes. The decision leaves health care providers in a state of turmoil: the "clear and convincing" evidentiary standard, as formulated and applied by the Michigan Supreme Court, is for all practical purposes impossible for hospitals and physicians to satisfy; the health care providers' traditional relationship with the patient and family members has been significantly infringed; the reliance which health care pro-

viders, in recent years, have come to place upon a patient's advance directive, surrogate or guardian, has been rendered highly questionable; and the nature of the proof required by the court will likely mean that medical treatment decisions will be made which do not conform to the wishes of the patient or are not beneficial to the patient.

I. THE CERTAINTY REQUIRED BY THE MICHIGAN SUPREME COURT IS MEDICALLY IMPOSSIBLE AND UPSETS THE TRADITIONAL DECISION MAKING FRAMEWORK

Throughout his entire adult life, Michael Martin was adamant in his opposition to artificial life-support in the event catastrophic illness or injury rendered him helpless and hopeless. Like so many other patients, Michael could not possibly have foreseen and described the specific injuries which he would suffer in his accident. In fact, it is medically impossible to predict one's future medical condition with the certainty the Michigan Supreme Court required of Michael. There are an enormous variety of closely related medical syndromes in which a patient loses capacity and becomes dependent: in some of these conditions, the patient may be conscious; in others, unconscious; and in still others, it may be unclear. Because of this practical problem, the Michigan Legislature, like many other state legislatures and ethicists nationwide, has recognized that the best way for a patient to maintain control over future medical treatment is to appoint a surrogate to make decisions for the patient when the patient has lost capacity.

For the Michigan Supreme Court to require absolute prescience as to the precise nature of future medical conditions virtually guarantees that individuals who do not want to be maintained in a dependent state, regardless of their underlying illness or mental state, will be unable to exercise their right to refuse treatment. By holding that a patient's wishes can be effectuated only where the pa-

tient has accurately predicted his precise condition, the Michigan Supreme Court has taken away the patient's direct mechanism for controlling his care. Then, by holding that a surrogate can only act where the patient has predicted his condition with absolute certainty, the court has also taken away the patient's only means to deal with that inherent uncertainty. In so doing, the court has impermissibly burdened a patient's primary and secondary means to effectuate his right to control his medical care and because of the medical reality of such uncertainty, has effectively left patients with no rights at all.

The practical reality is that health care providers frequently make withdrawal of treatment decisions based upon the incompetent patient's condition and prognosis, discussions with family members to ascertain the patient's previously-expressed wishes, values and life-style,[2] and consideration by a hospital ethics committee of the propriety of the proposed withdrawal of treatment. In fact, all of this occurred before Mary Martin petitioned the Probate Court to permit her to withdraw her husband's medical treatment.[3]

The *amici* fear that the decision below means that health care providers must turn to the courts whenever

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[2] The *Martin* majority concedes that its opinion runs counter to those from other jurisdictions which have almost unanimously granted the request of patients or guardians based upon evidence of the patient's wishes, values and life-style. See Petition for Writ of Certiorari, App. 18a-19a. The decision below almost totally disregarded all of those factors.

[3] As noted by Justice Levin in his dissent, the majority of the Michigan Supreme Court is "the first disinterested body to examine Michael Martin's case without being convinced by the ample evidence of his prior wishes." Petition for Writ of Certiorari, App. 31a. The Bioethics Committee of Butterworth Hospital concluded that the termination of Michael's medical treatment was both ethical and consistent with his pre-injury wishes. The independent guardian ad litem also recommended that life-support be withdrawn. The Probate Court and Michigan Court of Appeals reached the same conclusion.

termination of life-sustaining medical treatment is being considered and that, for conscious but incompetent patients, treatment will always need to be provided. Any common sense review of Michael Martin's statements regarding medical treatment would lead most providers to conclude that he never wanted to be maintained artificially in the dependent state in which he persists. The Michigan Supreme Court's opinion, holding that clear and convincing evidence of Michael's decision was not proved, leads to the obvious question, "How is the clear and convincing evidence standard to be translated at the bedside?" The *amici* fear that, as a result of the decision below, end-of-life decision making will be removed from the bedside and legal intervention will be routinely required. This will cause a serious breakdown in the doctor-patient relationship and will dramatically affect the manner in which decisions involving life-sustaining treatment are made.

In requiring absolute certainty before effectuating patients' wishes, the Michigan Supreme Court has radically interfered with the traditional framework in which end-of-life decisions are made. Traditionally, doctors have made these decisions together with patients and their families. To protect patients, many states, including Michigan, have put in place mechanisms to formalize that process, providing opportunities for patients to state their wishes and designate surrogates should they lose capacity to make these decisions for themselves. Hospitals have established bodies such as ethics committees to help doctors and patients in these situations.

The Michigan Supreme Court's decision destroys that process. Because of the standard of certainty it requires, doctors can no longer be confident that they are acting in accordance with their patients' wishes and cannot turn to surrogates for assistance. Doctors frequently will be forced to turn to the courts. This will not only prolong an already anguished period for patients and their families,

but it will make medical decision making tremendously more burdensome and expensive.

The Michigan Supreme Court's decision also further complicates the ability of health care providers to act in accordance with their patients' wishes. As a result of that court's decision, health care providers do not know where to turn to determine their patients' wishes or whether they can act to effectuate their patients' desires. This confusion increases the problems already existing in end-of-life decision making for health care providers. Currently, a tragic mismatch exists between the excessive amount of terminal care actually provided to patients and the amount of terminal care these patients truly desire. *See* The SUPPORT Principal Investigators, *A Controlled Trial to Improve Care for Seriously Ill Hospitalized Patients: The Study to Understand Prognoses and Preferences for Outcomes and Risks of Treatments (SUPPORT)*, 274 JAMA 1591 (1995). *See also* Bernard Lo, Editorial, *Improving Care Near the End of Life: Why Is It So Hard?*, 274 JAMA 1634 (1995); Leon Jaroff, *Knowing When to Stop: Doctors Go to Heroic Lengths to Keep Terminally Ill Patients Alive—Often Against Their Wishes*, Time, Dec. 4, 1995, at 76. This mismatch is tied, in large measure, to health care professionals' uncertainty over liability for acting on patients' desires to terminate life-sustaining treatment. *See* Mildred Z. Solomon et al., *Decisions Near the End of Life: Professional Views on Life-Sustaining Treatments*, 83 Am. J. Pub. Health 14, 19-20 (1993). *See also* Nancy Neveloff Dubler, *Commentary: Balancing Life and Death—Proceed with Caution*, 83 Am. J. Pub. Health 23, 24-25 (1993); Bruce C. Vladeck, *Editorial: Beliefs vs Behaviors in Healthcare Decision Making*, 83 Am. J. Pub. Health 13, 13 (1993). By disregarding most factors health care professionals consider when making these decisions with patients and their families, the Michigan Supreme Court has created further uncertainty which will force providers to turn to the courts, even in cases where a consensus may exist among those concerned for the

patient. This will serve only to exacerbate the dissatisfaction of patients and their families and will effectively prevent providers from correcting this problem.

In sum, the Michigan Supreme Court's decision fails to recognize the inherent uncertainties of medical decision making which make it impossible for patients to predict the specific circumstances which will befall them. As a result, that court has made it virtually impossible for patients to have their wishes effectuated, even when the health care provider and the patient's family are quite certain that termination of treatment is what the patient would have wanted. The court has also turned medical decision making on its head by radically interfering with the traditional framework in which decisions about termination of treatment are made; by further confusing an already uncertain area; and by placing courts, and not patients, those who are concerned for them, or health care providers, in the role of medical treatment decision maker.

II. THE MICHIGAN SUPREME COURT'S DECISION ABROGATES THE IMPORTANT ROLE OF SURROGATES

The decision below shows how the clear and convincing standard of proof can be manipulated to deny a person's liberty interest, and it starkly underscores why surrogates are so important. Because none of us has the ability to foresee precisely what will happen to us in the future, it is sometimes only through a trusted surrogate that our desires and values can be effectuated, and our liberty interest protected. As Justice O'Connor noted in *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), "[f]ew individuals provide explicit oral or written instructions regarding their intent to refuse medical treatment should they become incompetent." [4] As a practical matter, it is essential for health care providers to consult with an incompetent patient's surrogate in order to ensure that the patient's wishes and values are taken into account.

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[4] *Id.* at 289 (O'Connor, J., concurring).

Given the inability of individuals to predict with specificity what particular illnesses or injuries might arise in the future, the utilization of a surrogate is essential to ensure that an incompetent patient's liberty interests are protected. *See, e.g., Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion). *Thompson* involved a minor who was convicted of first degree murder and sentenced to death. The issue presented was whether execution of the sentence would violate the constitutional prohibition against cruel and unusual punishment because the petitioner was only 15 years old at the time of the offense. The Court recognized that "[t]he law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally," noting that "those who are irreversibly ill with loss of brain function . . . retain 'rights,' to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind." *Thompson*, 487 U.S. at 825 n.23 (citing John H. Garvey, *Freedom and Choice in Constitutional Law*, 94 Harv. L. Rev. 1756 (1981)).

The *amici* urge this Court to decide not only the issue of whether the States must defer to a surrogate's decisions when the patient has expressed the desire to have the surrogate act for him, but also to what extent the "clear and convincing" standard of proof can be used to limit the surrogate's authority. A fair reading of *Martin* compels the conclusion that, absent a specific description of the medical condition for which a withdrawal-of-treatment decision is to be made by a surrogate, the Michigan Supreme Court would not permit the surrogate to act. According to the court:

> A proper designation allows a third person to execute the patient's treatment decisions, even if the decision will result in death, *provided the patient is in the condition delineated in the patient advocate designation.*[5]

[5] Petition for Writ of Certiorari, App. 13a (emphasis added).

However, that is not what Michigan's medical proxy statute requires or contemplates, and the court should not have extended its restrictive interpretation of the "clear and convincing" evidentiary standard in such a manner. The Michigan statute uses the "clear and convincing" standard in two contexts only: a patient can authorize his advocate to make withdrawal of treatment decisions which result in death "only if the patient has expressed in a clear and convincing manner that the patient advocate is *authorized* to make such a decision," and the patient must *acknowledge* in a clear and convincing manner that "such a decision could or would allow the patient's death."[6] The statute, like many throughout the nation, nowhere requires a specific description of the patient's condition before the advocate has a right to make certain treatment decisions. This is consistent with the notion that, once a patient designates an advocate, the advocate may make all medical treatment decisions for the patient, including those that might result in the patient's death.

Following enactment of the Michigan statute, most hospitals throughout Michigan have utilized a medical durable power of attorney form adopted by the Michigan Hospital Association, the Michigan State Medical Society, the Michigan Association of Osteopathic Physicians & Surgeons, Inc., and the State Bar of Michigan. This form is made available to patients as part of the hospitals' obligation, under the Federal Patient Self-Determination Act, to advise patients of their right to designate a surrogate to make decisions regarding life-sustaining medical treatment.[7] Yet *Martin* raises a serious question as to the

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[6] Mich. Comp. Laws Ann. § 700.496(7)(d) (West 1992) (emphasis added).

[7] Omnibus Budget Reconciliation Act of 1990 (OBRA-90), Pub. L. 101-508, §§ 4206 and 4751 (Medicare and Medicaid, respectively), 42 U.S.C. §§ 1395cc(a)(1)(Q), 1395cc(i), 1395mm(c)(8), 1396a(a)(57), 1396a(a)(58), and 1396a(w) (1993 & Supp. 1995). The Act requires that health care providers maintain written policies and procedures with respect to all individuals receiving medical

validity of the form, inasmuch as it does not require that the patient describe with specificity the circumstances under which a surrogate may withdraw life-sustaining medical treatment.

III. THE MICHIGAN SUPREME COURT'S OPINION HAS A DELETERIOUS EFFECT ON MEDICAL DECISION MAKING

The decision below will only serve to exacerbate problems which health care providers experience insofar as termination of life-sustaining treatment is concerned. Rather than risk being denied the right to remove a gastrostomy tube, many patients and their families may decide simply to forgo insertion of the tube and run the "risk" of poor nutrition and hydration. This can often be medically counterproductive because such a tube may be the extra therapeutic support needed by the patient to pull through a limited medical crisis. This negative impact on medical decisions has been recognized by the courts. *See In re Conroy*, 486 A.2d 1209 (N.J. 1985). The court in that case was presented with the request of a guardian to remove a nasogastric tube on behalf of a comatose patient who had not previously expressed any sentiment on life-support. The court noted:

> Moreover, from a policy standpoint, it might well be unwise to forbid persons from discontinuing a treatment under circumstances in which the treatment could permissibly be withheld. Such a rule could discourage families and doctors from even attempting certain types of care and could thereby force them into hasty and premature decisions to allow a patient to die.

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care by or through the provider, to advise their patients of the right, under state law, to make decisions concerning medical care, "including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives." 42 U.S.C. 1395cc(f)(1)(A).

In re Conroy, 46 A.2d at 1234. *See also Gray v. Romeo*, 697 F. Supp. 580, 588-89 & n.4 (D.R.I. 1988) (authorizing husband/guardian of unconscious patient to remove feeding tube and life-support of spouse). The *Martin* holding will only serve to chill full and frank discussions between patients, their families, and their physicians, and create doubt in the minds of the decision makers at a time when they do not have days or weeks to reflect on their decision.

CONCLUSION

As a result of the significant negative impact which the decision below has had on the medical community and on the ability of patients and their surrogates to be involved in the medical decision making process, the *amici* urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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No. 95821

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

MARY MARTIN, Guardian of Michael Martin,

Petitioner,

v.

PATRICIA MAJOR and LEETA MARTIN,

Respondents.

AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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The Autism Society of Michigan
United Cerebral Palsy
The Association for
Community Advocacy
The Disability Network
American Disabled for Assistant
Programs Today
The Disability Rights Bar Association
The American Association of
Mental Retardation
National Legal Center for the Medically
Dependent & Disabled, Inc.

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STATEMENT OF INTEREST OF AMICI CURIAE

This Brief is submitted on behalf of ten organizations devoted to the protection of the rights of persons with disabilities. Amici represent persons with various disabilities -- including mental retardation, autism, and traumatic brain injury -- and offer this Brief on behalf of their constituencies, whose interests will be profoundly affected by this Court's decision.

Michigan Protection and Advocacy Service (MPAS) is the Michigan agency charged with implementing the federal protection and advocacy (P&A) statutes enacted to protect the legal rights of people with disabilities.[1] The P&A statutes express Congress' belief that disability is part of the human condition, that people with disabilities have value, and that their voices -- regardless of legal competence or the severity of impairment -- must be heard. MPAS, in conjunction with nine other advocacy organizations, asks this Court to let amici be their voice here. Not only will amici's constituents be affected by this Court's decision, but amici have seen how decisions to terminate life support are sometimes made in the real world.

MPAS' mission is to advance the dignity, equality, self-determination, and expressed choices of individuals. To that end, and in harmony with Congress' core policy, MPAS has been significantly involved in the legal, legislative, administrative, institutional, and civic processes impacting on people with disabilities and their rights.

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[1] The statutes are the Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. 6000 *et. seq.*, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. 10801 *et. seq.*, and the Protection and Advocacy for Individual Rights Act of 1992, 29 U.S.C. 794e(a). Pursuant to M.C.L. 330.1931, MPAS is the designated agency in Michigan to represent the rights of the persons protected by these statutes, and Michael Martin is within the class of persons protected. 29 U.S.C. 794e(a).

MPAS has substantial experience in cases addressing fundamental rights, including representation of persons with disabilities in involuntary commitments, medical treatment decisions, and involuntary sterilization. The decades of experience of MPAS in protecting the rights of persons with disabilities renders MPAS uniquely qualified to assist this Court in its consideration of a petition which affects Michael Martin and the thousands of people who will live or die by the Court's decision in the years to come.

MPAS is joined in this Brief by nine other organizations committed to protecting the rights of persons with various handicapping conditions.

The Arc of Michigan (formerly the Association for Retarded Citizens or ARC) is a private, non-profit agency with a long history of advocating for the rights of Michigan's citizens who have mental retardation. The Arc, on a daily basis, assists persons with mental retardation to secure public services such as special education, vocational rehabilitation, and mental health services. The Arc's activities also include advocacy in guardianship and other issues affecting personal rights. It is the experience of the Arc of Michigan that all citizens, regardless of handicap, can live quality, productive lives in their communities.

The Autism Society of Michigan is a United Way, non-profit advocacy organization that represents Michigan citizens with autism and their families. Autism is a developmental disability which manifests itself by varying degrees of impairment in communication skills, cognitive functioning, and social interaction. The Autism Society advocates that all citizens with autism be fully included as valued members of our society.

United Cerebral Palsy (UCP) of Michigan is a membership agency which safeguards the rights and interests of persons with cerebral palsy. UCP is engaged in a wide variety of services, advocacy, and educational efforts on behalf of persons with cerebral palsy. Cerebral palsy is an impairment of brain function which affects motor control and coordination.

The Association for Community Advocacy (ACA) is a human service organization dedicated to promoting the general welfare of persons with developmental disabilities. ACA advocates for the rights of those it serves, promotes maximum opportunity for their participation in the community, and assures the provision of needed services.

The Disability Network is a Michigan agency that supports people with disabilities through education, consultation, and direct advocacy efforts in the areas of housing, transportation, attendant care, and many other services. The Network is committed to promoting the rights and opportunities of all people with disabilities.

American Disabled for Assistant Programs Today (ADAPT) is a Michigan non-profit coalition of individuals and organizations who work with other national ADAPT programs to provide community-based personal assistance services. ADAPT is working for change in any area where the rights of persons with disabilities are in jeopardy.

The Disability Rights Bar Association (DRBA) is a special purpose organization recognized by the State Bar of Michigan. DRBA's purpose is to encourage the implementation of disability rights law for all Michigan citizens with disabilities. Pursuant to this purpose, the DRBA provides resources and assistance to the private

bar to assist in the representation of persons with disabilities to secure their legal rights.

The American Association of Mental Retardation (AAMR) is the Michigan Chapter of a national organization. AAMR promotes educational and advocacy efforts on behalf of citizens with mental retardation. The Michigan chapter particularly promotes inclusion and maximum community opportunities for all persons with disabilities.

The National Legal Center for the Medically Dependent & Disabled, Inc. provides legal advocacy to persons with disabilities by defending their medical treatment rights against denials based on rationing, "quality of life" surrogate decision making, and discriminatory animus. The National Legal Center has participated in numerous court cases regarding life-sustaining treatment decision making, including the Supreme Court case of *Cruzan v. Director, Missouri Department of Health.*

Amici, as a result of their history of representing the interests of persons with disabilities and their first-hand knowledge of the devaluation and vulnerability of such persons, have serious concerns that a review of the case will upset the important balance of competing interests the Michigan Supreme Court has carefully crafted. Amici's constituencies include thousands of Michigan citizens who were born with severe cognitive impairments and who have never been legally competent or capable of exercising "informed consent." Such persons, like Michael Martin, nevertheless have "capacities" and the ability to express "personal needs and preferences." 42 USC 6000(a)(3). The Michigan Supreme Court appropriately created safeguards to protect the liberty and life interests of individuals with disabilities. Without these vital safeguards, the life support of these citizens can be terminated -- even if they are not terminally ill, in a

persistent vegetative state, or in pain -- regardless of their expressed choices.

Amici are also alarmed about the result that might occur if the Michigan safeguards are relaxed: surrogate decision-makers, with their own distinct and potentially conflicting interests, will be empowered to make a quality of life judgment that will result in the death of another human being.

SUMMARY OF ARGUMENT

Michigan, pursuant to this Court's deference to the "laboratory of the States," has further defined the qualitative meaning of the "clear and convincing evidence" standard which this Court has previously found to be a permissible regulation on decisions to terminate life support for an incompetent person. In crafting appropriate safeguards, Michigan has carefully considered the unique circumstances of the present case -- including the fact that Michael Martin is not terminally ill, in a persistent vegetative state, or in pain -- and the available sources of Michigan law and policy.

Further, the evidence on record indicates that Michael Martin is expressing the current desire to live, and this desire should be controlling in light of Mr. Martin's fundamental liberty interest and the complementary interests of Michigan, including those interests expressed in its recent Patient Advocacy Act. Michigan's Act is part of a nationwide effort of the States to fill in the details regarding the standards and procedures to be employed in termination of life support cases. These standards uniformly reject withdrawal of life support in the circumstances presented here, demonstrating that Michigan's regulation is consistent with the concept of ordered liberty.

Thus, review of Michigan's decision is not called for. Michigan, advancing interests of the highest magnitude -- to preserve life, protect individual liberty, and protect incompetent persons from conflicts of interests -- has properly rejected uncorroborated testimony of an interested party regarding previous statements about medical treatment and surrogate designation. Review is also unnecessary given the extensive and careful State regulation across the nation.

ARGUMENT

As the Developmental Disabilities Assistance and Bill of Rights Act states, disability is a "part of the human experience."[2] Accordingly, the presence of a disability does not mean that an individual is deprived of the right to "enjoy self determination" and to "make choices."[3] These expressions of public policy are consistent with constitutional principles, including the substantive due process liberty interest of an individual to make decisions about medical care and treatment. In the view of amici, the present petition for certiorari is not so much about advance directives or about the designation of a surrogate for medical decision-making as it is about the current choices of a living individual, Michael Martin, to "exert control and choice" over his own life, despite his disability.[4]

In its decision in *Cruzan*,[5] this Court upheld a State practice of requiring clear and convincing evidence of an advance directive to terminate life support for an individual in a persistent vegetative state, noting:

> Today we decide only that one State's practice does not violate the Constitution; the more challenging task of crafting appropriate procedures for safeguarding incompetents' liberty interests is entrusted to the "laboratory" of the States.[6]

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[2] 42 U.S.C. 6000(a)(2).

[3] *Id.*

[4] 2 U.S.C. 6001(13).

[5] *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990).

In the present case, the Michigan Supreme Court, pursuant to the challenge left open in *Cruzan* and cognizant of this Court's admonitions regarding the quality of evidence one would expect to support such a critical decision, has crafted a more detailed standard of what "clear and convincing evidence" must look like. In so doing, the Michigan Supreme Court, as *Cruzan* envisioned, had available to it "a number of sources ... which are not available to us,"[7] including the State's Patient Advocacy Act.[8] This Act clearly articulates the policy of Michigan regarding the safeguards required to protect the State's complementary interests in the preservation of life, the assurance that persons with disabilities retain their liberty interest in exerting control over their lives, and the protection of incompetent persons from over-reaching:

> A current desire by a patient, irrespective of a previous expressed or evidenced desire, to have provided, and not withheld or withdrawn, a specific life extending care, custody, or medical treatment shall be binding on the patient advocate, if known by the patient advocate, regardless of the then ability or inability of the patient

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[6] *Id.* at 292 (O'Connor, J., concurring).

[7] *Id.* at 277.

[8] Although the PAA was enacted subsequent to Mr. Martin's disability and therefore does not govern the case, it nevertheless provides persuasive guidance on the public policy of the State. More importantly for purposes of the request for certiorari, the recent enactment of such statutes in almost every State militates against granting review, as the laboratory of the State Legislatures, in conjunction with their court systems, has effectively filled any voids left in the wake of this Court's decision in *Cruzan*.

to participate in care, custody, or medical treatment decisions or the competency of the patient.[9]

Presumably, the discernment of the current wishes of the patient himself can be made in a way similar to determining the patient's current wish to revoke his designation of a surrogate: "at any time and in any manner by which he or she is able to communicate an intent."[10] In this regard, amici believe that the evidence on record indicating that Mr. Martin, through a series of hand squeezes which were checked for accuracy by an expert, has expressed the *current* intention to live is determinative under both the policy of Michigan's Patient Advocacy Act and under substantive due process, since a person does not lose his fundamental liberty interest when declared legally incompetent.

Neither such statutory safeguards, nor the Michigan Supreme Court's elaboration on the quality of evidence needed to reach the high level of "clear and convincing," constitutes an undue restriction on the individual's interest. Rather, as suggested above, the present case does not concern a conflict between the liberty interests of the individual and the interests of the State. Michigan's compelling interest in the preservation of life is complemented by Mr. Martin's current expressions of the desire to live. Further, given the Michigan Supreme Court's implicit skepticism about the uncorroborated testimony of an interested party, Michigan's strong *parens patriae* interest in protecting incompetent persons is added to this

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[9] M.C.L. 700.496(13) (emphasis added). Significantly, the Michigan Act recognizes that even persons who are legally incompetent may still be able "to participate in ... medical treatment decision.".

[10] M.C.L. 700.496(11)(d).

constellation of interests supporting Michigan's decision in the present case. [11]

As the Michigan Supreme Court duly noted, Michael Martin's situation is distinct from other "right to die" cases because he is not in a persistent vegetative state, terminally ill, or in pain. A review of the cases where withdrawal of life-sustaining treatment has been requested for a person who is legally incompetent reveals that no such requests were granted unless a persistent vegetative state, terminal illness, or a writing of sufficient solemnity was present.[12] Further, upon considering every living will statute in the nation, it can also be said that no State authorizes the withdrawal of life-sustaining treatment for an individual in Mr. Martin's condition absent a writing.[13] Michigan's safeguards are thus consistent with the concept of ordered liberty and with the procedures crafted by the States and do not merit review by this Court.

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[11] Based on their experiences, amici are especially concerned about transmuting the inquiry from the patient's previous wishes to the patient's purported designation of a surrogate. The amici's constituents are frequently vulnerable to conflicting financial and emotional interests, including the desire of family members to stop the perceived "suffering" of a loved one. Given such societal and familial pressures, a purported designation of a surrogate should require *additional* safeguards, not deference to a self-proclaimed surrogate.

[12] Meisel, *The Right to Die*, 122 (Cum. Supp. 1994).

[13] As these cases and statutes suggest, the State's interests in the preservation of life and the protection of incompetent persons increases in circumstances where, for example, the individual is not terminally ill or where the evidence of purported previous expressions of intent is inherently unreliable.

CONCLUSION

Accordingly, Amici urge this Court to deny the Petition for Certiorari.

Respectfully submitted,

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APPENDIX

M.C.L.A. 700.496

WEST'S MICHIGAN COMPILED LAWS ANNOTATED
CHAPTER 700. REVISED PROBATE CODE
ARTICLE 4. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS
Current through the End of 1993 Regular Session

700.496. Patient designation of advocate for health care decisions; form, contents, and execution of designation; authority and limitations of patient advocate

Sec. 496. (1) A person 18 years of age or older who is of sound mind at the time a designation is made may designate in writing a person who is 18 years of age or older to exercise powers concerning care, custody, and medical treatment decisions for the person who made the designation. For purposes of this section, a person who is named in a designation to exercise powers concerning care, custody, and medical treatment decisions shall be known as a patient advocate and a person who makes a designation shall be known as a patient.

(2) A designation shall be in writing, signed, witnessed pursuant to subsection (3), dated, executed voluntarily, and before its implementation shall be made part of the patient's medical record with the patient's attending physician and, if applicable, with the facility where the patient is located. The designation shall include a statement that the authority conferred under this section shall be exercisable only when the patient is unable to participate in medical treatment decisions.

(3) A designation shall be executed in the presence of and signed by 2 witnesses. The witnesses shall not be the patient's spouse, parent,

child, grandchild, sibling, presumptive heir, known devisee at the time of the witnessing, physician, patient advocate, an employee of a life or health insurance provider for the patient, an employee of a health facility that is treating the patient, or an employee of a home for the aged as defined in section 20106 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20106 of the Michigan Compiled Laws, where the patient resides. A witness shall not sign the designation unless the patient appears to be of sound mind and under no duress, fraud, or undue influence.

(4) A designation may include a statement of the patient's desires on care, custody, and medical treatment. The patient may authorize the patient advocate to exercise 1 or more powers concerning the patient's care, custody, and medical treatment, that the patient could have exercised on his or her own behalf.

(5) A patient may designate in the designation a successor individual as a patient advocate who may exercise powers concerning care, custody, and medical treatment decisions for the patient if the first individual named as patient advocate does not accept, is incapacitated, resigns, or is removed.

(6) Before its implementation a copy of the designation shall be given to the proposed patient advocate and shall be given to a successor patient advocate prior to the successor acting as patient advocate. Before acting as a patient advocate, the proposed patient advocate shall sign an acceptance to the designation.

(7) The acceptance to a designation as a patient advocate shall contain the following:

"(a) This designation shall not become effective unless the patient is unable to participate in medical treatment decisions.

(b) A patient advocate shall not exercise powers concerning the patient's care, custody, and medical treatment that the patient, if the patient were able to participate in the decision, could not have exercised on his or her own behalf.

(c) This designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.

(d) A patient advocate may make a decision to withhold or withdraw treatment which would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.

(e) A patient advocate shall not receive compensation for the performance of his or her authority, rights, and responsibilities, but a patient advocate may be reimbursed for actual and necessary expenses incurred in the performance of his or her authority, rights, and responsibilities.

(f) A patient advocate shall act in accordance with the standards of care applicable to fiduciaries when acting for the patient and shall act consistent with the patient's best interests. The known desires of the patient expressed or evidenced while the patient is able to participate in medical treatment decisions are presumed to be in the patient's best interests.

(g) A patient may revoke his or her designation at any time and in any manner sufficient to communicate an intent to revoke.

(h) A patient advocate may revoke his or her acceptance to the designation at any time and in any manner sufficient to communicate an intent to revoke.

(i) A patient admitted to a health facility or agency has the rights enumerated in section 20201 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.20201 of the Michigan Compiled Laws."

(8) The authority under a designation executed under this section shall be exercisable by a patient advocate only when the patient is unable to participate in medical treatment decisions. The patient's attending physician and another physician or licensed psychologist shall determine upon examination of the patient when the patient is unable to participate in medical treatment decisions, shall put the determination in writing, shall make the determination part of the patient's medical record, and shall review the determination not less than annually. If the patient's religious beliefs prohibit an examination and this is stated in the designation, the patient shall indicate in the designation how it shall be determined when the patient advocate shall exercise powers concerning decisions on behalf of the patient. If a dispute arises as to whether the patient is unable to participate in medical treatment decisions, a petition may be filed with the probate court in the county in which the patient resides or is found requesting the court's determination as to whether the patient is unable to participate in medical treatment decisions. If a petition is filed under this subsection, the court shall appoint a guardian ad litem to represent the patient for the purposes of this subsection. The court shall conduct a hearing on a petition under this subsection as soon as possible and within 7 days of the court's receipt of the petition. As soon as possible and within 7 days after the hearing, the court shall determine whether or not the patient is able to participate in medical treatment decisions. If the court determines that the patient is unable to participate in

medical treatment decisions, the patient advocate's authority, rights, and responsibilities shall become effective. If the court determines that the patient is able to participate in medical treatment decisions, the patient advocate's authority, rights, and responsibilities shall not become effective.

(9) An individual designated as a patient advocate under this section shall have the following authority, rights, responsibilities, and limitations:

(a) A patient advocate shall act in accordance with the standards of care applicable to fiduciaries in exercising his or her powers.

(b) A patient advocate shall take reasonable steps to follow the desires, instructions, or guidelines given by the patient while the patient was able to participate in care, custody, or medical treatment decisions, whether given orally or as written in the designation.

(c) A patient advocate shall not exercise powers concerning the patient's care, custody, and medical treatment that the patient, if the patient were able to participate in the decision, could not have exercised on his or her own behalf.

(d) This designation cannot be used to make a medical treatment decision to withhold or withdraw treatment from a patient who is pregnant that would result in the pregnant patient's death.

(e) A patient advocate may make a decision to withhold or withdraw treatment which would allow a patient to die only if the patient has expressed in a clear and convincing manner that the patient advocate is authorized to make such a decision, and that the patient acknowledges that such a decision could or would allow the patient's death.

(f) A patient advocate under this section shall not delegate his or her powers to another individual without prior authorization by the patient.

(10) A designation executed under this section is suspended when the patient regains the ability to participate in medical treatment decisions. The suspension is effective as long as the patient is able to participate in medical treatment decisions. If the patient subsequently is determined under subsection (8) to be unable to participate in medical treatment decisions, the patient advocate's authority, rights, responsibilities, and limitations shall again become effective.

(11) A designation executed under this section is revoked by any of the following:

(a) The death of the patient.

(b) An order of dissolution by the probate court under subsection (16).

(c) Resignation of the patient advocate or removal of the patient advocate by the probate court, unless a successor patient advocate has been designated.

(d) Revocation of the designation by the patient. Even if the patient is unable to participate in medical treatment decisions, a patient may revoke a designation at any time and in any manner by which he or she is able to communicate an intent to revoke the designation. If there is a dispute as to the intent of the patient to revoke the designation, the probate court may make a determination on the intent of the patient to revoke the designation. If the revocation is not in writing, a person who witnesses a revocation of a designation shall describe in writing the circumstances of the revocation, shall sign the writing, and shall notify, if possible, the patient advocate of the revocation. If the patient's physician or health facility has notice of the patient's

revocation of a designation, the physician or health facility shall note the revocation in the patient's medical records and bedside chart, and shall notify the patient advocate.

(e) A subsequent designation that revokes the prior designation either expressly or by inconsistency.

(f) The occurrence of a provision for revocation contained in the designation.

(g) If a designation is executed during a patient's marriage naming the patient's spouse as the patient advocate, the designation shall be suspended during the pendency of an action for separate maintenance, annulment, or divorce and shall be revoked upon the entry of a judgment of separate maintenance, annulment, or divorce, unless the patient has named a successor individual to serve as a patient advocate. If a successor patient advocate is named, that individual shall act as the patient advocate.

(12) The revocation of a designation of a patient advocate under subsection (11) does not revoke or terminate the agency as to the patient advocate or other person who acts in good faith under the designation and without actual knowledge of the revocation. An action taken without knowledge of the revocation, unless the action is otherwise invalid or unenforceable, binds the patient and his or her heirs, devisees, and personal representatives. An affidavit executed by the patient advocate stating that he or she did not have at the time of doing an act pursuant to the designation actual knowledge of the revocation of the designation is, in the absence of fraud, conclusive proof that the patient advocate did not have actual knowledge of the revocation at that time of the revocation.

(13) A current desire by a patient, irrespective of a previous expressed or evidenced desire, to have provided, and not withheld or withdrawn, a specific life extending care, custody, or medical treatment shall be binding on the patient advocate, if known by the patient advocate, regardless of the then ability or inability of the patient to participate in care, custody, or medical treatment decisions or the competency of the patient.

(14) A person providing, performing, withholding, or withdrawing care, custody, or medical treatment as a result of the decision of an individual who is reasonably believed to be a patient advocate and who is reasonably believed to be acting within the authority granted by the designation, is liable in the same manner and to the same extent as if the patient had made the decision on his or her own behalf.

(15) A person providing care, custody, or medical treatment to a patient is bound by sound medical practice and by the instructions of a patient advocate if the patient advocate complies with this section, and is not bound by the instructions of a patient advocate if the patient advocate does not comply with this section.

(16) If a dispute arises as to whether a patient advocate is acting consistent with the patient's best interests, or is otherwise not complying with this section, a petition may be filed with the probate court in the county in which the patient resides or is found requesting the court's determination as to the continuation of the designation or the removal of the patient advocate.

(17) A patient advocate cannot make a medical treatment decision under the authority of or under the process created by this section to withhold or withdraw treatment from a pregnant patient that would result in the pregnant patient's death.

(18) A health care provider shall not require a designation to be executed as a condition of providing, withholding, or withdrawing care, custody, or medical treatment.

(19) A life or health insurer shall not do any of the following because of the execution or implementation of a designation or because of the failure or refusal to execute or implement a designation:

(a) Refuse to provide or continue coverage to the patient.

(b) Limit the amount of coverage available to a patient.

(c) Charge a patient a different rate.

(d) Consider the terms of an existing policy of life or health insurance to have been breached or modified.

(e) Invoke a suicide or intentional death exemption or exclusion in a policy covering the patient.

(20) A designation executed under this section shall not be construed to condone, allow, permit, authorize, or approve suicide or homicide.

(21) Except as provided in subsections (18) and (19), this section shall only apply to or affect a person who has executed a designation. This section shall only apply to or affect a person acting for or on behalf of another person who has executed a designation.

(22) Nothing in this section shall be considered to authorize or compel care, custody, or medical treatment decisions for a patient who objects on religious grounds.

(23) A designation executed before the effective date of this section with the intent of accomplishing a similar purpose as this section is valid but shall be subject to subsection (1) and subsections (4) through (23), shall be in writing, signed, witnessed or notarized, dated, executed voluntarily, and before its implementation shall be made part of the patient's medical record.

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Petitioner,

v.

PATRICIA MAJOR and LEETA MARTIN,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

REPLY BRIEF OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-821

MARY MARTIN, Guardian of Michael Martin,
Petitioner,

v.

PATRICIA MAJOR and LEETA MARTIN,
Respondents.

On Petition for Writ of Certiorari to the Michigan Supreme Court

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REPLY BRIEF OF PETITIONER

Until the decision of the Michigan Supreme Court, every official body to consider Michael Martin's case—the hospital ethics committee, the guardian *ad litem*, the trial court, and the court of appeals—concluded that Mary Martin was acting consistently with her husband's express wishes in seeking to remove the feeding tube that currently serves to prolong Michael's hopelessly dependent condition. Both the trial court and a unanimous court of appeals found the evidence of Michael's wishes "clear and convincing." Indeed, there is no contrary evidence of Michael's intent. Thus, it was only by fashioning a more restrictive evidentiary standard—one that requires individuals to predict the "specific circumstances" of their incapacity—and by ignoring the unequivocal evidence that, above all else, Michael wanted his wife, Mary, to ensure that his medical treatment decisions conformed with his wishes, that the Michigan Supreme Court could reach the startling result that it did.

This case therefore squarely poses both of the questions presented in the petition. And, as the opposition and briefs of *amici curiae* serve to underscore, the questions are of vital importance. The *amici curiae* who oppose the petition because of their "serious concerns" that the Court will reverse the decision below concede that there are many persons "whose interests will be profoundly affected by this Court's decision" on this petition.[1] The *amici curiae* who support the petition demonstrate that the decision below compounds the confusion that already exists concerning the ability of patients, through the advance expression of their wishes to spouses or other family members, to control medical decisionmaking after they lose competence.[2]

Respondents do not and cannot dispute the importance of the issues raised. Rather, they misstate the relevant law and facts, frivolously dispute the Court's jurisdiction, and defend the merits of the decision below. None of these stratagems undermines the importance of resolving the constitutional issues presented.

I.

Respondents initially attempt to argue that the first question presented does not merit review because "[t]he *Martin* Court decision here follows the analytical path carved by several states and *Cruzan* over the past twenty years."[3] But that argument cannot be sustained, as the

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[1] Brief of Michigan Protection and Advocacy Service *et al.* as *Amici Curiae* in Support of Respondent's Response to Petition for Writ of Certiorari at 2, 5.

[2] Brief of the University of Michigan Medical Center *et al.* as *Amici Curiae* in Support of Petitioner.

[3] Response to Petition for Writ of Certiorari ("Opp.") at 11-12; *see also id.* at 19 (analysis below "followed this Court's lead in *Cruzan* in every instance, and its statement of the law conforms with *Cruzan*"). These statements also dispose of respondents' half-hearted assertion—raised on page 1 of their brief but never argued

amici curiae who oppose the petition concede, because the Michigan Supreme Court was forced to go beyond anything this Court sanctioned in *Cruzan* v. *Director, Missouri Department of Health*, 497 U.S. 261 (1990), and impose "a more detailed standard" [4]—the "specific circumstances" requirement—in order to reverse the decisions of the lower state courts. Thus, in attempting to reconcile the Michigan Supreme Court's decision with *Cruzan* and with the decisions of other courts cited by petitioner (see Pet. at 13-14), respondents are forced ultimately to argue that the heightened evidentiary requirement imposed here is justified because "the state's interest in life is elevated if the petition subject is neither in a persistent vegetative state nor terminally ill" (Response to Petition for Writ of Certiorari ("Opp.") at 20), and because "Martin has demonstrated a current desire to live" (*id.* at 24). Neither distinction is valid, and neither is a basis for denying review.

The fact that Michael's condition is not precisely that of a persistent vegetative state cannot justify imposing an additional burden, beyond the clear and convincing standard as applied by other courts, upon the ability of

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—that this Court lacks jurisdiction over the first question presented because the decision below rested upon Michigan common law. The Michigan Supreme Court plainly relied upon *Cruzan* and thus interwove federal law with its state rulings. It is also notable that the Michigan Supreme Court made no statement sufficient to establish adequate and independent state grounds under *Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983). Furthermore, where, as here, state law is less protective of federal constitutional rights than is federal law, and the federal constitutional issues have been raised before the state court, even express and exclusive reliance upon state law will not serve to insulate the opinion from this Court's review. *Massachusetts* v. *Upton*, 466 U.S. 727, 738 (1984) (per curiam) (Stevens, J., concurring).

[4] These *amici curiae* concede that this case required the Michigan Supreme Court to establish "a more detailed standard of what 'clear and convincing evidence' must look like." Brief of Michigan Protection and Advocacy Service *et al.* as *Amici Curiae* in Support of Respondent's Response to Petition for Writ of Certiorari at 9.

patients to enforce their medical treatment wishes. A patient's liberty interest in refusing unwanted medical treatment is not grounded in quality-of-life concerns, but in the value our society has traditionally accorded the individual's right to self-determination. *Cruzan*, 497 U.S. at 278-79; *id.* at 287-89 (O'Connor, J., concurring). This liberty interest is one that both conscious and unconscious patients possess. *Id.* at 278-79. Indeed, the liberty interest evolved from the doctrine of informed consent, which has had its chief application in decisionmaking by competent patients. *Id.* at 269-70. Thus, respondents' notion that the liberty interest of a patient who is *not* unconscious is somehow more vulnerable to state intrusion than that of a patient who is unconscious, has no basis in law and effectively turns the evolution of the liberty interest on its head.

Not surprisingly, many state courts have refused to restrict the ability of patients to refuse medical treatment based on quality-of-life considerations such as the lack of terminal illness or indications of some awareness of self or environment. The Florida Supreme Court, for example, held that the constitutional right of an incompetent patient to refuse life-sustaining treatment "cannot be qualified by the condition of the patient" and therefore permitted removal of life-prolonging treatment from an incompetent, nonterminal patient who was unable to communicate but had some awareness of her environment. *In re Guardianship of Browning*, 568 So. 2d 4, 7-9, 13 (Fla. 1990). The highest courts of several other states have upheld the rights of competent quadriplegic patients to refuse life-sustaining treatment in the absence of terminal illness. See *Thor* v. *Superior Court*, 855 P.2d 375, 387 (Cal. 1993); *State* v. *McAfee*, 385 S.E.2d 651, 652 (Ga. 1989); *McKay* v. *Bergstedt*, 801 P.2d 617, 631-32 (Nev. 1990). Another state's highest court has upheld the right of a competent, nonterminal patient to refuse life-sustaining blood transfusions for an ulcer. See *Norwood Hosp.* v. *Munoz*, 564 N.E.2d 1017, 1025

(Mass. 1991); *cf. In re Spring*, 405 N.E.2d 115, 122-23 (Mass. 1980). In short, numerous courts agree that "[a]ll patients, competent or incompetent, with some limited cognitive ability or in a persistent vegetative state, terminally ill or not terminally ill, are entitled to choose whether or not they want life-sustaining medical treatment." *In re Peter by Johanning*, 529 A.2d 419, 423 (N.J. 1987). Respondents' bald assertion that "[h]ad the Court [below] held for the petitioner, *Martin* would have been the first appellate case nationwide authorizing withdrawal of life supports from an incompetent person who was neither in a persistent vegetative state nor terminally ill" (Opp. at i-ii) is thus categorically incorrect.

Equally misleading is respondents' repeated assertion that Michael has expressed a current "desire to live" that should outweigh his previously expressed views. *Id.* at 16 & n.11, 24. None of the courts below found that assertion credible, and it flies in the face of everything those courts did find and accept as true about Michael. See Pet. App. 3a-9a.[5] These misstatements reveal respondents' determined resistance to acknowledge the harsh reality of Michael's existence today. See Pet. at 2-3, 5. As the Butterworth Hospital Ethics Committee determined, "the persistence of his condition and the level

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[5] To respond fully to each of respondents' misstatements and mischaracterizations of the record would require a separate reply. One telling example is respondents' extended recitation of the testimony of Dr. Kreitsch, who stated that Michael's frequent "smiling" and " 'large grin' " were indicative of a happy disposition. Opp. at 2-3. The probate court specifically rejected that testimony: "The smile in this Court's opinion and based on the best medical evidence before it, is a condition of his brain damage and it is not a reflection of an emotion of happiness." Pet. App. 86a. As Dr. Cranford, who observed a huge smile on Michael's face when both he and Mary, at separate times, told Michael that his daughter, Melanie, had been killed in the accident, noted, "the horror in this case is you don't know what he's thinking for sure, you don't know what he's feeling. He sure isn't feeling pleasure when he smiles unless he's glad that his daughter's dead." R. 488b; *see also* R. 446b, R. 449b, R. 466b-468b, R. 483b, R. 495b-498b.

of his functioning were equivalent to a persistent vegetative state for purposes of considering the removal of nutrition support." R. 633b.

Respondents' attempt to rewrite the facts of Michael's existence and ignore the findings made and accepted below is in any event beside the point. There is no dispute about the relevant facts, because the Michigan Supreme Court accepted the findings of fact as summarized by the court of appeals. Pet. App. 3a-9a. The basis for its disagreement with the court of appeals was in the legal standard to be applied, which was in turn grounded on the Michigan Supreme Court's determination that a higher standard was appropriate given the patient's specific circumstances. That determination was erroneous, because an individual's liberty interest in refusing treatment, by its very nature, transcends particular diagnoses of consciousness or unconsciousness. The Michigan Supreme Court's departure from *Cruzan* and from the decisions of other state supreme courts therefore merits review by this Court.

Respondents' other points only reinforce the importance of the petition. Respondents argue that because Michigan had not clearly defined the rights of patients to provide for future medical decisionmaking at the time of Michael's accident, Michael has no viable claim today that he was deprived of notice sufficient to allow him to protect his liberty interest in refusing unwanted treatment. Opp. at 23-24. The argument sidesteps the crucial point. Michael *had* a liberty interest in refusing treatment prior to his accident, and he sought to exercise it in a most reasonable, time-honored way: by confiding repeatedly in and relying upon his spouse. Having confirmed in *Cruzan* that individuals do have such a constitutional liberty interest, this Court should now clarify that the Due Process Clause forbids states from adopting procedures that operate to deny persons who have acted reasonably the ability to protect that interest.

Finally, while respondents deny that the decision below is inconsistent with this Court's decision in *Planned Parenthood* v. *Casey*, 112 S. Ct. 2791 (1992), they concede that in *Casey* "this Court wrestled with principles which are present here." Opp. at 28. Indeed, the fundamental question at issue there—the degree to which an individual's ability to exercise her liberty interests may be burdened by state procedural rules—is also the question here. Respondents' admission of *Casey*'s relevance—and the Michigan Supreme Court's complete indifference to the serious burden its "specific circumstances" test has placed on individuals seeking to protect against unwanted medical treatment—underscores the need for plenary review of the opinion below.

II.

Even if there were any significant doubt whether the evidence of Michael's treatment choices was sufficiently clear and convincing, there is no doubt that Michael wished to have his wife Mary, and not his mother or sister—let alone a physician, a hospital administrator, a judge, or the Michigan Supreme Court—decide whether and how he should be kept alive. Thus, even if the Michigan Supreme Court's holding on the lack of clear and convincing evidence could be sustained, this case nevertheless squarely raises the important constitutional question of mandatory state deference to surrogate decisionmakers that this Court deliberately left open in footnote 12 of its opinion in *Cruzan*, and that Justice O'Connor addressed at length in her concurring opinion.

Respondents nowhere dispute that this question is an important constitutional issue that needs to be decided by this Court. They claim only that the issue was not properly raised below and that it is not ripe. Neither claim has merit.

Respondents base their assertion of a failure to raise the issue below entirely upon the fact that petitioner did not cite specifically to footnote 12 of *Cruzan* in her brief

before the Michigan Supreme Court. Opp. at 25 (quoting Pet. at 8-9 n.8). But this Court has never required such precision in determining whether issues were fairly placed before lower courts. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). Petitioner's explicit reliance below on *Cruzan* in attempting to obtain permission to carry out Michael's previously expressed treatment wishes was plainly sufficient to place the surrogacy issue before the Michigan Supreme Court. See *Taylor* v. *Illinois*, 484 U.S. 400, 406-07 n.9 (1988); *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 85-87 n.9 (1980).

There is similarly no basis for respondents' argument that the claim is not ripe. A principal point of the Michigan Court of Appeals' initial decision to remand the case for further factfinding was to clarify the record on the propriety of Mary's guardianship (see Pet. at 4; Pet. App. 101a-111a), and the trial court made unequivocal findings on this that respondents do not and cannot dispute. See Pet. at 7 & n.7; Pet. App. 34a n.17, 66a, 83a; R. 391b. The trial court found, by clear and convincing evidence, that Mary, and not Michael's mother or sister, was the person who was attempting in good faith to implement Michael's treatment wishes. Pet. App. 83a. There is far more than mere "competent and probative evidence" (*Cruzan*, 497 U.S. at 287 n.12) of Michael's desire to entrust Mary to act in his behalf, and the question reserved in *Cruzan* is thus properly presented.

* * * * *

At bottom, this case is about the Michigan Supreme Court's decision to substitute its view of the quality of Michael's life and hence of the wisdom of withdrawing treatment for the views that Michael expressed before his accident and for the trust he placed in Mary to honor his wishes. Nothing in the traditions of individual and family autonomy that have long informed this Court's understanding of the fundamental liberty interests protected by the Due Process Clause permit such state inter-

ference, see *Parham* v. *J.R.*, 442 U.S. 584, 600-02 (1979), nor should *Cruzan* be interpreted to sanction such a result. The decision of the Michigan Supreme Court is irreconcilable with other state supreme court decisions as well as with decisions of this Court and, unless review is granted by this Court, will operate in the future, as it has in this case, to deprive individuals of their rights under the United States Constitution.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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